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# THE IDOLATRY OF RULES: WRITING LAW ACCORDING TO MOSES, WITH REFERENCE TO OTHER JURISPRUDENCES

Arthur J. Jacobson\*

Moses, unlike Socrates, writes. He writes about writing. He writes about writing law. He writes about reading it, erasing it, learning and teaching it.

The first mention of writing in the *Five Books* occurs in the second, which English speakers call by the Greek name *Exodus*, but which Hebrew speakers call *Names*.<sup>1</sup> The scene is the first battle of the people of Israel after their flight from Egypt. The battle is against Amalek, in Refidim. It is the occasion in Moses' text for the introduction of Joshua, Moses' aide-de-camp.<sup>2</sup> It is also the moment in which

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\* Max Freund Professor of Litigation and Advocacy, Cardozo School of Law, Yeshiva University. This essay is a meditation on writing law, informed by a reading of the works of Jacques Derrida. Citation to single works of his is beside the point. Thanks to him and collaborators who helped me understand Moses' text—Rabbi J. David Bleich, Rabbi Marvin Petruck, and Peninah Petruck. It would be a mistake to say that my students, Ori Karev and Yehuda Najman, helped me with the translations: I helped them. Thanks also to David Carlson, Drucilla Cornell, and Michel Rosenfeld for their inspiration, and to Stephen K. Firestein for a model of collaborative writing.

<sup>1</sup> Names, XVII, 14-16. From now on I will refer to cites from *Names* by a roman numeral chapter and an arabic numeral verse only.

I prefer to use English translations of the Hebrew names of the *Five Books*, rather than the (mostly) Greek translations, which are more familiar. The tradition names each book by the first significant word in the text of the book. Hence:

Genesis	In the Beginning Of ( <i>Bereshit</i> )
Exodus	Names ( <i>Sh'mot</i> )
Leviticus	He Called ( <i>Vayikra</i> )
Numbers	In the Wilderness ( <i>Bamidbar</i> )
Deuteronomy	Propositions ( <i>D'varim</i> )

English calls the last book *Deuteronomy*, but *d'varim* means words, propositions, discourses, matters, or things. *Propositions* contains the last propositions or discourses of the dying lawgiver. The best Greek translation is *Logoi*, not *Deuteronomos* ("second law").

Moses also uses the word "*d'varim*" to describe the "ten *d'varim*," usually translated as "ten commandments." Moses does not call them "commandments,"—"*mitsvot*"—a word he reserves for other matters. In order to reveal the Hebrew text as well as possible in English, I translate "*d'varim*" as "propositions" wherever it occurs, regardless of better English choices in context.

These names resonate more powerfully than the anglicized Greek with various themes woven elaborately and carefully into the fabric of the *Five Books*.

<sup>2</sup> XVII, 9. Joshua will figure prominently at two further points in the *Five Books*: the second and third of three covenants between God and Israel, at Names, XXXIII, 11 ("but his servant Joshua-bin-Nun, a young lad, did not depart out of the tent"), and at Propositions, XXXI, 14, 23 and XXXII, 44.

the people of Israel, who have been slaves in Egypt for 430 years,<sup>3</sup> first collaborate as partners with God in fighting the enemies of Israel.<sup>4</sup>

Moses makes seven more references to writing in *Names*, all during the sojourn of the Israelites at Mt. Sinai.<sup>5</sup> He also includes a reference to reading,<sup>6</sup> directly after the first Sinaitic reference to writing, and one to erasure,<sup>7</sup> between the fourth and fifth Sinaitic references to writing. Moses thus refers to writing eight times and the activities surrounding it twice immediately before, during, and immediately after the revelations at Mt. Sinai.<sup>8</sup>

The point of view of the narrator in Moses' text is virtually unavailable to modern writers. Modern narrators speak in one of two voices. Either the author narrates, or a character narrates.<sup>9</sup> The first voice presents a narrator who knows everything about the world in the novel, because the voice of the narrator has created it.<sup>10</sup> The narrator is a god. "He" rules the novel directly, if not frankly. The second voice, by contrast, speaks only as a particular consciousness in the world created by the author. The narrator knows only certain things, because he has not created the world. The author remains all-

<sup>3</sup> XII, 40.

<sup>4</sup> The Israelites played a passive role in prior collaborations. During the departure, when Pharaoh decided to pursue the Israelites, Moses comforted the people, saying: "Yahweh will fight for you." XIV, 14. Moses writes, "Thus Yahweh saved Israel that day." XIV, 30. And: "And Israel saw the great hand which Yahweh did upon the Egyptians, and the people feared Yahweh and believed in Yahweh and in Moses His servant." XIV, 31. The Israelites did not fight for themselves, up to Refdim.

<sup>5</sup> XXIV, 4; XXIV, 12; XXXI, 18; XXXII, 15-16; XXXIV, 1; XXXIV, 27-28; XXXIX, 30.

Though Refdim is the first mention of writing, the first mention of "book" (*sefer*) is in the first verse of the fifth chapter of *In the Beginning Of*. Moses describes *In the Beginning Of* as the "book of the generations of man [*adam*]."

<sup>6</sup> XXIV, 7.

<sup>7</sup> XXXII, 32.

<sup>8</sup> Moses thus refers to writing and the activities surrounding it altogether ten times—the number of propositions that are the subject of God's writing on the two tables and the number of meetings between Moses and God at Mt. Sinai.

<sup>9</sup> In the epistolary novel, more than one character narrates. The narrative voice of the epistle, at least in the Western tradition, is a late Judaic or early Christian invention. Given the ceaseless search of moderns for markets, I'm sure there are exceptions to my categories.

Maurice Blanchot has written about the narrative voice along these lines in "La Voix narrative," first published in *L'Entretien infini* (1969). See Blanchot, *The Narrative Voice* (the "he," the neuter), in *The Gaze of Orpheus and other literary essays* 133-43 (L. Davis trans. 1981).

<sup>10</sup> Sometimes authors who speak in this voice nonetheless suggest a distance between the narrator and the author. To that extent, the narrator shifts to the second voice, becoming a character. Often, narrators of the first sort assume the voice of a reporter, without assuming the responsibilities of a creator. The "fate" of the characters excuses the author from responsibility. Here too, the narrator shifts partly to the second voice, assuming the role of a character subject to the same fate as his creations.

knowing and powerful. He is a hidden god, alternately embracing and rejecting the limited point of view of the narrator. He rules the novel indirectly, behind the back of the narrator.

The narrator in Moses' "novel" does not take the perspective of the all-knowing, powerful creator. He does not play God. He resists the temptation to be Pharaoh. Moses knows only what he sees and what God tells him, nothing more. He writes, and acknowledges that he writes. He writes about his own writing, and God's. Nor does the narrator take the perspective of the ordinary, limited consciousness. Moses is not God, but he has spoken with God. He is the "friend" of God.<sup>11</sup> The claim of the narrator, that he has spoken with God, is a lesser claim than the claim of modern authors, one less familiar to moderns.

Moses was not unfamiliar with those who assume the god-like perspective of modern authors. He calls them "*elohim*"—"rulers," "judges," or "gods." He also calls God "*Elohim*"—"Rulers"—when he wishes to refer to God as an author—the all-knowing, powerful creator of the narrative's world. (To call God "*Elohim*" is to criticize the opinion that rulers are the source of their own rule. "Rulers" rules, not rulers.) He calls God "*Yahweh*," when he wishes to refer to Him as a character interacting with other characters in the world created, and therefore ruled, by *Elohim*. The name "*Yahweh*" in Hebrew makes no sense in ordinary terms. It is said to be made up of particles from the tenses—past, present, and future—of the verb "to be." "*Yahweh*" is "That Which Is What Has Been And Will Be."<sup>12</sup>

<sup>11</sup> XXXIII, 11. Jose Faur has discussed the special status of the narrator in the *Five Books*. See Faur, *God as a Writer: Omnipresence and the Art of Dissimulation*, 6 Religion & Intell. Life 31 (1989). Erich Auerbach's comparison between the Homeric and Mosaic narratives in *Mimesis* is less useful. See E. Auerbach, *Mimesis* (1946).

<sup>12</sup> A suitable English translation of "*Yahweh*" might be a word formed from the first letters of "That Which Is What Has Been and Will Be": "Twihwbawb." *Yahweh* is simply four letters in Hebrew: *Yud-Hay-Vov-Hay* (the Tetragrammaton). One writes it, in Hebrew, but does not say it. One says, instead, "*Adonai*," "Our Sire," "*Notre Seigneur*." So one would write, "Twihwbawb," and say, "Our Sire." See *infra* note 17.

Unlike the Greek "*ousia*," which asserts changeless "being," "*Yahweh*" asserts "becoming," ceaseless moving from past to future through present. Maimonides equates "*Yahweh*" with "*ousia*":

Accordingly it has become clear to you that all names are derived or are used equivocally, as *Rock* and others similar to it. He, may He be exalted, has no *name* that is not derivative except the *name having four letters*, which is the articulated *name*. This name is not indicative of an attribute but of simple existence [*ousia*] and nothing else. Now absolute existence implies that He shall always be, I mean He who is necessarily existent. Understand the point at which this discourse has finally arrived.

M. Maimonides, *The Guide of the Perplexed*, pt. I, ch. 63, at 156 (S. Pines trans. 1963) (footnote omitted). I do not feel the same need to conform to Aristotelian philosophy. I start with

Yahweh is character defining itself through past interactions and committed to change through further interactions. Yahweh is "Friend." Where Elohim rules, Yahweh interacts. Man approaches Elohim as a child approaches a parent, a creation approaches a creator, a subject approaches a ruler. He approaches Yahweh as a collaborator, a friend.<sup>13</sup>

Moses, who is both narrator of the *Five Books* and a character in them, has relations with both Elohim and Yahweh. As narrator, Moses "takes dictation" from Elohim, the all-knowing, powerful God of the narrative. As a character, Moses is friend of Yahweh. The

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Hegel's critique of Aristotle. See G. Hegel, *Science of Logic* 94-118 (W. Johnston & L. Struthers trans. 1929).

Maimonides does not disagree, however, that "Yahweh" signifies God in relation to persons. That is the significance of his striking claim that the Tetragrammaton is the "articulated name" of God. See *infra* note 123.

The etymology of the English word "God" is disputed. According to the Oxford English Dictionary, a probable Aryan root is "*ghuto-m*," the neuter of the passive pluperfect of "*gheu*," whose root is either "to invoke" (Sanskrit, "*hu*") or "to pour, to offer sacrifice" (Sanskrit, "*hu*"). Hence, "*ghuto-m*" has been interpreted as "what is invoked" and "what is worshipped by sacrifice." 4 The Oxford English Dictionary, "god," at 267 (1970). Translators of the *Five Books* correctly use "God" for "Elohim," since "*elohim*," just like "god," names any object of worship as well as the one, true object. They also translate "Yahweh" by the spoken Hebrew substitute: "Our Lord." This translation is, of course, wrong, since the written English should translate the written Hebrew.

<sup>13</sup> Rashi accounts for the different names of God:

This name (Elohim) denotes the attribute of justice (*din*), but it was changed into the attribute of mercy (*rah.amim*) through the prayers of the righteous. But the evil behavior of wicked people changes the attribute of mercy into the attribute of justice, as it is said, "and Y saw that the wickedness of man was great," etc., "and Y said, I will erase," although it is the name denoting the attribute of mercy.

The Pentateuch and Rashi's Commentary: A Linear Translation into English (A. Ben Isaiah & B. Sharfman trans. 1950) ("Rashi's Commentary"). In the Beginning Of, VIII, 1 ("And Elohim remembered Noah"). (I use the system of transliteration which sounds "h." as "ch." I have altered the translation when I have thought necessary for consistency or precision.)

"Mercy" is the standard translation of the Hebrew "*rah.amim*." The idea, more exactly, is "pardon," refraining from imposing a just sanction. Rashi thus views Yahweh as "anti-Elohim," inasmuch as Yahweh refrains from imposing Elohim's sanctions. I believe that the text gives evidence that Yahweh is something other than "anti-Elohim," though "anti-Elohim" overlaps with the attribute I claim for Yahweh. I call this attribute "collaboration," "friendship," the sympathy generated by working together on a joint project. (The notion of "collaboration" is also distinct from "*hesed*," which means "benevolence," the gratuitous conferral of a benefit, apart from duty.)

Thus collaborators can and should be merciful towards one another—release each other from duties, refrain from imposing sanctions suggested by justice. But collaborators will not approach pardon from the emotional posture of "mercy," which I believe to be the posture of a superior towards a fractious inferior. Collaborators approach pardon as the sympathy generated by working together on a joint project, as friends. To join Yahweh with mercy is to retain the "*elohim*" perspective, the perspective of a subject to a ruler. Yahweh's perspective, I suggest, is the perspective of co-workers on a joint project. Moses, we shall see, influences Yahweh, makes an impression on Yahweh, causes Him to change. He could not do this did Yahweh advocate only release from justice. See *infra* text accompanying notes 86-87 & 140.

story of Elohim's narrative is the drama of Moses and Yahweh. It is the conflict between Moses as narrator and Moses as character.

The drama of Moses and Yahweh, the conflict between Moses as narrator and Moses as character, may be seen as a struggle over the names of God, "Elohim" and "Yahweh." Elohim rules over types and classes. Single characters cannot be the friend of Elohim. To be a character is to challenge the rule of types and classes. Yahweh is the name of God who befriends characters, who tolerates challenges to Elohim. Yahweh challenges his own rule, the rule of Elohim. The drama of the text is the question: Does Elohim rule or does Yahweh collaborate with characters?

The text gives the question a legal formulation: Do legal rules rule or do characters? Legal rules rule by commanding or prohibiting classes of specific acts, and by punishing disobedience with sanctions. Characters rule by ruling themselves according to ten propositions (ten *d'varim*, *dekalogoi*). Propositions rule by assent, by the aspirations of characters, not by commanding or prohibiting classes of specific acts using sanctions. To rule by propositions is to engage in ceaseless conversation with Yahweh.<sup>14</sup> The text at once poses rules to substitute for the collaboration of characters with Yahweh, and challenges rules when characters reconstruct themselves through action according to propositions.

The text also formulates the drama as a relentless concern with graven images.<sup>15</sup> An idol is a completed creation. Creation is complete, when Elohim rules. When Yahweh collaborates with characters, creation is ongoing. To approach God only as Elohim is to treat creation as finished. It is to consider things as products, not as constituents of further creation. It is to treat things as idols. Everything that will be has been given. It is, because it has been. Yahweh asserts that what will be, is not, because it has not been. Nothing is given. Creation is incomplete. Things are constituents of further creation, not idols. To bow to idols is to assert that what will be has been given. It is to treat God only as Elohim. It is to approach Him as a subject, rather than as a collaborator. If Elohim must rule and not characters, then rules too must be graven: Moses must reduce the rules to writing. Yet Moses warns repeatedly against graven images

<sup>14</sup> Today, following Hegel, we would characterize this ceaseless conversation as "self-consciousness." Though the parallels are by no means exact, perhaps the best translation of "Yahweh" is "Self-consciousness" (*Selbstbewusstsein*), and "Elohim," "Consciousness" (*Bewusstsein*).

<sup>15</sup> The Hebrew "*pesel*," which is usually translated as "idol" or "graven image," has the root meaning of "statue."

at crucial moments in the drama. The crisis of Mt. Sinai is a crisis of graven images. It is a crisis of writing.

The text thus poses the drama as a struggle over writing: Does Elohim write or does Moses? If only Elohim writes, then characters have no role in creation. Moses must write in order to befriend Yahweh. He must destroy and replace Elohim's writing. But if Moses writes, then people will bow to the text as a graven image. They will want Moses to be Pharaoh. They will be without character. Yahweh/Moses must write a second time what Elohim first wrote and Moses destroyed. Moses must write as a collaborator of Yahweh, not as *elohim*/Pharaoh.

#### WRITING AND THE EPISODES AT MT. SINAI

The sojourn at Mt. Sinai covers the climactic weeks in Moses' entire narrative of the *Five Books*, from the beginning of time<sup>16</sup> to Moses' death just before the arrival of the Israelites in Canaan. The text presents an elaborate and puzzling sequence of events during these weeks. One must know the sequence in order to appreciate the role of writing in the Sinaitic revelation. In outlining the sequence, I want to avoid two tendencies, each of which is, nevertheless, quite instructive.

The first is the effort to order and rationalize the sequence in a prosaic chronology. Rashi, the authoritative French commentator, proceeds in this manner.<sup>17</sup> He does so, I believe, for two reasons. He wants the text not to offend strict dramatic logic. He also wants the multiple references to writing in the text—Moses' writing, God's writing, and Moses' account of his own and God's writing—to work to-

<sup>16</sup> Unlike Laurence Sterne, Elohim knows how to begin a novel. See L. Sterne, *The Life and Opinions of Tristram Shandy*, passim (1759).

<sup>17</sup> See, e.g., Rashi's Commentary, Names, XXXI, 18 ("And he gave unto Moses, etc."): There is no "earlier" or "later" (i.e., there is no chronological order necessarily) in Scripture. The incident of the (golden) calf preceded the commandment of the construction of the tabernacle by many days, for on the seventeenth of Tammuz were the Tables broken and on the Day of Atonement was the Holy One Blessed Be He reconciled to Israel, and on its morrow they began the contributions for the tabernacle, and it was set up on the first of Nisan (tanh.uma).

Id.

For an example of Rashi's deconstructive technique, look at his commentary on the missing letter "vov" in the word "*le-olam*" ("forever") in the sentence, "This is My name forever." Rashi says that concealment of the letter means that God's name, Yahweh, ought to be concealed, that is, written but not spoken. See Rashi's Commentary, Names, III, 15 ("This is My name forever.").

The refusal to say "Yahweh" may be seen as a sign of respect, flowing from the expected mutuality of the relationship with Yahweh, which in turn flows from the individuality of both Yahweh and the person addressing Him.

gether without conflict. Rashi thus seeks to make sense of the text in ordinary terms, a sense not directly available from the text without interpretation.

Take, as an example Rashi does not discuss for this point, Jethro's criticism of Moses, just prior to the revelation at Mt. Sinai.<sup>18</sup> In the two-or-so months from the departure from Egypt to the arrival in Refidim, Moses sat to judge the people without the aid of other leaders. Jethro, who was Moses' father-in-law, arrived in Refidim with Tsipporah, Moses' wife, and their two sons, directly after the battle with Amalek. When Jethro observed Moses judging, he sternly criticized him for undertaking too heavy a burden. Moses, he said, must appoint subordinate judges for ordinary matters. Otherwise he will wear himself out.<sup>19</sup> Moses closes the scene by stating that "Moses sent away his father-in-law; and he went his way into his own land [*Midyan*]."<sup>20</sup> The very next statement in the text records the arrival of the Israelites at Mt. Sinai. Thus it would appear that Jethro left the Israelite encampment prior to the arrival at Mt. Sinai. Yet we know from later scenes that Jethro was present in the encampment after the revelation at Mt. Sinai.<sup>21</sup> The text does not record his return from Midian. Was Jethro present in the camp during the sojourn at Mt. Sinai? We do not know. The mystery of the passage deepens when we consider that Jethro's departure precedes the bulk of the revelations recorded in *Names* and the following books. We know that God revealed "a decree (*h.ok*) and a rule (*mishpat*)" at Marah, just after the departure from Egypt.<sup>22</sup> But Moses did not have much revelatory law to use in Refidim.<sup>23</sup> Did he use the customary law the

<sup>18</sup> These events are described in *Names*, XVIII.

<sup>19</sup> XVIII, 17-23.

<sup>20</sup> XVIII, 27.

<sup>21</sup> In the Wilderness, X, 29-32.

<sup>22</sup> XV, 25.

<sup>23</sup> Apart from Marah, the following are the references to decree (*h.ok*), rule (*mishpat*), and doctrine (*torah*—"teaching" or "learning," in non-latin English):

(1) In the Beginning Of, XXVI, 5 (Yahweh promising Isaac to establish the oath He swore to Abraham and to multiply Isaac's seed, etc.): "because that Abraham harkened to My voice, and kept My charge, My commandments, My decrees and My doctrines."

(2) *Names*, XII, 14: "And you shall celebrate it [the Passover day] as a feast to the Yahweh throughout your generations, as a decree forever shall you celebrate it."

(3) XII, 17: "[T]herefore shall you keep this day [Passover] throughout your generations a decree forever."

(4) XII, 24: "And you shall observe this thing [smearing blood on the lintels], for a decree to you and to your children forever."

(5) XII, 43: "And Yahweh said to Moses and to Aaron: This is the decree of the passover".

(6) XII, 49: "One doctrine shall be to the native and to the stranger that sojourns in the midst of you [referring to the passover feast]."



Hebrews undoubtedly possessed prior to Sinai?<sup>24</sup> Moses tells Jethro that he is using revelatory, not customary law. Why does Moses choose to discuss the burdens of judging at this moment, in Refidim? Or was the discussion after Mt. Sinai, as the Jethro story suggests? Again, we do not know.

The second tendency I want to avoid is the critical dissolution of the text into distinct traditions, separated by purpose and origin, only to be united by a hypothetical single or group compiler in later ages.<sup>25</sup> Apart from the "interpretive" grounding of this approach, lacking as it is in documentation outside the text, we must be permitted to assume that the compiler, at least, was an artful arranger. Why would the compiler leave oddities and inconsistencies in the text, such as the Jethro episode? Surely, one purpose of the compiler would be to eliminate oddities and inconsistencies. If he or they did not, we must ask what purpose the compiler had in leaving them in. All we can do, reading as we must behind the veil of ignorance, is puzzle out for ourselves the purposes, whether those of an historical Moses, or some later compiler or compilers of diverse traditions, whom we might as well give the name, Moses.

An overview of the events at Mt. Sinai encompasses eight (or possibly six) ascents Moses made to confer with God, together with two (or possibly four) episodes in which Moses conferred with God without going to the top of the mountain. In the first of the two episodes, Moses met with God on the slopes of the mountain; in the second, in the Tent of Meeting.<sup>26</sup>

(7) XIII, 9-10: "And it [the passover feast] shall be to you for a sign upon your hand, and for a memorial between your eyes; in order that the doctrine of Yahweh may be in your mouth; for with a strong hand Yahweh has taken you out from Egypt. And you shall keep this decree in its season from year to year."

(8) XV, 25-26: "There [Marah] He made for them a decree and a rule, and there He tried them. And He said: If you will diligently hearken to the voice of Yahweh your Elohim, and what is right in His eyes will you do, and you will listen to His commandments, and you will keep all His decrees, all the diseases which I have put on the Egyptians I will not put on you; for I am the Yahweh your doctor."

There is one other reference to a "decree" prior to the Sinaitic revelation: Joseph's decree levying a tax of the fifth of each harvest for Pharaoh. In the Beginning Of, XLVII, 26.

<sup>24</sup> Moses does not refer to the "Noachide Commandments" as any form of decree, rule, doctrine, or commandment. In the Beginning Of, IX, 1-7.

<sup>25</sup> An excellent (and typical) text in the critical tradition is M. Noth, *Exodus: A Commentary* (J. Bowden trans. 1962) (first published as *Das Zweite Buch Mose*, Exodus in 1959).

<sup>26</sup> XXXII, 30 - XXXIII, 3, and XXXIII, 12 - XXXIV, 3.

I use brackets in the following summary to indicate that Moses is off the top of the mountain and not in solo conference with God. The numbered passages indicate that Moses is in solo conference, either on the top or slopes of the mountain, or in the tent of meeting.

I also use bold-face to indicate references to writing, reading and erasure. "W1," etc. indicate the references to writing; "R" indicates reading; and "E" indicates erasure.

*First meeting* (first ascent): Yahweh's first message to the people.<sup>27</sup>

[Moses tells the people Yahweh's propositions and the people answer.<sup>28</sup>]

*Second meeting* (second ascent): Moses tells Yahweh the people's propositions; Yahweh gives preparatory instructions.<sup>29</sup>

[Moses prepares the people and brings them to meet Elohim; Yahweh comes down upon Mt. Sinai.<sup>30</sup>]

*Third meeting* (third ascent): Yahweh repeats the preparatory instructions, adding special instructions for the priests.<sup>31</sup>

[Elohim speaks the ten propositions (ten *d'varim*, *dekalogoi*) to Moses and the people; the people ask Moses to mediate.<sup>32</sup>]

*Fourth meeting* (and the first without an ascent): "Moses drew near to the fog where Elohim was"; Yahweh introduces His teaching of the legal rules (*mishpatim*) to Moses with three prohibitions against idolatrous cults (precious metals, hewn stone altars, uncovered genitals), and teaches Moses the legal rules.<sup>33</sup>

[Yahweh orders Moses to bring Aaron, Aaron's sons, and seventy of the elders to "come up to Yahweh", warning that only Moses shall come near; Moses speaks all the propositions and all the rules to the people; he writes "all the propositions" of Yahweh (W2); he reads the "book of the covenant in the ears of the people" (R); he performs a covenant ceremony (dashing blood against an altar and throwing it on the people); Moses,

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Moses met with God ten times at Mt. Sinai—eight (or possibly six) ascents, one meeting on the slopes of the mountain and one in the Tent of Meeting. The meeting on the slopes follows upon the scene in which God speaks the ten propositions. Moses hears God's rules (*mishpatim*), or specifications of the ten propositions (*dekalogoi*), during this meeting on the slopes, and writes them down. In the meeting in the Tent of Meeting Moses renegotiates the covenant. The eight meetings at the top of the mountain echo the eight references to writing, excluding reading and erasure. The meeting on the slopes echoes the reference to reading (reading is a sort of writing), and the meeting in the Tent of Meeting, where Moses renegotiates the covenant, echoes the reference to erasure (a sort of renegotiation).

The text is silent on the venue of the seventh and eighth meetings (XXXIII, 1-3 and XXXIII, 5), unlike the venues of the other eight meetings, with respect to which the text is quite explicit. Though I choose to regard the venue of the two meetings about which the text is silent as the top of the mountain, the silences may be calculated to reinforce what the text will reveal as ambiguities about writing: W7 expresses an ambiguity as to whether Moses or Yahweh is writing the second set of tablets, and W8, an ambiguity as to whether the activities of Betsalel and Oholiav constitute writing or engraving. See *infra* text accompanying notes 45-48. The first reference to writing (W1) was in Refidim.

<sup>27</sup> XIX, 3-6.

<sup>28</sup> XIX, 7-8.

<sup>29</sup> XIX, 8-13.

<sup>30</sup> XIX, 14-20.

<sup>31</sup> XIX, 20-24.

<sup>32</sup> XX, 1-17.

<sup>33</sup> XX, 18 - XXIII, 33.

Aaron, Aaron's sons and seventy of the elders go up, see Elohim, and celebrate a meal; Yahweh orders Moses to ascend, saying, "I will give you the tablets of stone, the doctrine and the commandment which I have written that you mayb teach them." (W3)]<sup>34</sup>

*Fifth meeting* (fourth ascent): Moses spends forty days and nights on Mt. Sinai; Yahweh instructs Moses to make the implements of the cult, to install Aaron and his sons in the priest's office, to use Betsalel ("and I have filled him with the spirit of Elohim")<sup>35</sup> and Oholiav to help him, and to instruct the Israelites to keep the Sabbath (not doing work);<sup>36</sup> Yahweh gives Moses the "two tablets of testimony, tablets of stone, written with the finger of Elohim". (W4)<sup>37</sup>

[Moses delayed: crisis of the golden calf, Aaron fashions the calf "with an engraving tool."]<sup>38</sup>

<sup>34</sup> XXIV, 1-14.

<sup>35</sup> XXXI, 3.

<sup>36</sup> Unlike the legal rules (*mishpatim*), Moses does not classify the instructions of the cult systematically as one sort or another of legal material. He does not call them either "*mishpatim*" (rules) or "*torah*" (doctrine). He refers to three of the instructions as "*hukim*" (decrees): XXVIII, 43 (a perpetual decree to Aaron and his sons to wear the priest's clothes); XXIX, 9 (the priesthood is a perpetual decree to Aaron and his sons); XXX, 21 (a perpetual decree to Aaron and his sons to wash their hands and feet when they minister at the altar).

Rashi comments that decrees are "propositions" (*d'varim*) which are only the decree of the king, without any reason given for them. He cites the prohibition against wearing a mixture of wool and linen, against the eating of the flesh of swine, and the law of the red heifer, as examples. Rashi's Commentary, Names, XV, 26 ("All His decrees").

He opposes decree (*hok*) to rule (*mishpat*): rules have reasons:

The Holy One Blessed Be He said to Moses: "It should not enter your mind to say, 'I shall teach them the chapter or the law [*halakhah*] two or three times, until it will be fluent in their mouths as it is worded, but I shall not trouble myself to make them understand the reasons of the thing and its explanation.' Therefore it is stated, "which thou shalt set before them"—like a table which is set and prepared for eating before a person.

Rashi's Commentary, Names, XXI, 1 ("Now these are the rules which you shall set before them").

I translate "*mishpatim*" as "legal rules", rather than the usual translation, "ordinances." "*Mishpat*" in other contexts means "sentence," either the sentence on a page or the sentence a judge imposes on a criminal, just as in English. The word "rule" in English has come to mean law accompanied by reason. It might have been better to translate "*mishpat*" as "ruling", since the Hebrew preserves an identity between "rule", which is general, and "sentence", which judges tailor to the individual. ("*Lish-por*" means "to adjudicate.") The English does not. The closest one comes in English to preserving the identity between rule and sentence is the word "ruling": "The judge made a ruling." The English word "ordinance" has come, by contrast, to mean a minor municipal regulation. It is quite irrelevant here.

The use in Hebrew of the same word for rule and sentence may be asserting that rules are not "general" in the sense American law treats them as general. A "*mishpat*" speaks directly to the souls of individuals, as if it were a sentence.

<sup>37</sup> XXIV, 15 - XXXI, 18.

<sup>38</sup> XXXII, 1-6.

Yahweh orders Moses to return to the people; Moses pleads with Yahweh, who relents; Moses returns with the two tablets; "the writing was the writing of Elohim, graven on the tablets." (W5)<sup>39</sup>

[Moses smashes the tablets; Aaron pleads with Moses; division of the camp and slaying of recalcitrant idolaters.]<sup>40</sup>

*Sixth meeting* (fifth ascent): "Yet now, if You will forgive their sin, and if not, erase me, please, from Your book" (E); Yahweh tells Moses He will erase from his book anyone who has sinned against Him; Yahweh smites the people, "because they made the calf, which Aaron made."<sup>41</sup>

*Seventh meeting* (possibly the sixth ascent): Yahweh tells Moses to order the people to depart for Canaan, and says He will send an angel before them; "The people heard this evil tiding [that Yahweh would not be "present" on the journey to Canaan] and they mourned."<sup>42</sup>

*Eighth meeting* (possibly the seventh ascent): Yahweh tells Moses to order the people to remove their ornaments (Moses records that prior to this meeting no one put on ornaments, since they were mourning over the loss of Yahweh's presence); "They stripped themselves of ornaments."<sup>43</sup>

*Ninth meeting* (in the Tent of Meeting): Moses negotiates a second covenant ("Yahweh spoke to Moses face to face, as a man speaks to his friend"); Yahweh orders Moses to hew two tablets of stone like the first, and says He will write on the tablets the propositions that were on the first tablets. (W6)<sup>44</sup>

*Tenth meeting* (either the sixth or eighth ascent, depending on the place of the sixth and seventh meetings): Moses hews the two tablets and goes up to Mt. Sinai; the second covenant, warnings against making covenants with others and against idolatry; Yahweh orders Moses to write "these propositions," on the basis of which Yahweh had made a covenant with Moses and Israel; "He [referring to either Yahweh or Moses] wrote [in Moses' presence] the propositions of the covenant, the ten propositions" (W7); after forty days and nights, Moses descends with the two tablets, his face glowing.<sup>45</sup>

[Moses carries out the instructions of the fifth meeting;<sup>46</sup> Bet-

<sup>39</sup> XXXII, 7-16.

<sup>40</sup> XXXII, 17-30.

<sup>41</sup> XXXII, 31-34.

<sup>42</sup> XXXIII, 1-3.

<sup>43</sup> XXXIII, 5.

<sup>44</sup> XXXIII, 12 - XXXIV, 3.

<sup>45</sup> XXXIV, 6-29.

<sup>46</sup> XXXV, 1 - XL, 38.

salel, and Oholiav "made the plate of the holy crown of pure gold, and wrote on it a writing, like the engraved pattern of a seal: Holy to Yahweh." (W8)<sup>47</sup> (Yahweh had instructed Moses to order Betsalel and Oholiav "to engrave," not "to write."<sup>48</sup>)]

We may abstract the eight references to writing (W), the one to reading (R) and the one to erasing (E):

- W1 Refidim, the battle with Amalek: Yahweh commands Moses to "write this to remember it in the book."<sup>49</sup>
- W2 Moses writes "all Yahweh's propositions" (just prior to Moses' fourth ascent of Mt. Sinai).<sup>50</sup>
- R Moses reads his book of the covenant in the ears of the people.<sup>51</sup>
- W3 Yahweh offers tablets of stone, on which He has already written "the doctrine and the commandment."<sup>52</sup>
- W4 Yahweh delivers the tablets, "written with the finger of Elohim."<sup>53</sup>  
[Moses delayed; interruption of the conversation with Yahweh by the episode of the golden calf; Aaron fashions the calf "with an engraving tool."]<sup>54</sup>
- W5 Conversation resumes; Moses descends with the tablets; "the writing was the writing of Elohim, graven on the tablets."<sup>55</sup>
- E Moses requests that Yahweh either forgive the Israelites for the golden calf or "erase me from Your book which You have written."<sup>56</sup>
- W6 Yahweh offers two more tablets; "I will write on the tablets the propositions which were on the first tablets, which you broke."<sup>57</sup>

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<sup>47</sup> XXXIX, 30.

<sup>48</sup> XXVIII, 36, and XXXI, 1-6.

<sup>49</sup> XVII, 14-16.

<sup>50</sup> XXIV, 4.

<sup>51</sup> XXIV, 7.

<sup>52</sup> XXIV, 12.

<sup>53</sup> XXXI, 18.

<sup>54</sup> XXXII, 1-6.

<sup>55</sup> XXXII, 15-16.

<sup>56</sup> XXXII, 32.

<sup>57</sup> XXXIV, 1.

- W7 Yahweh commands Moses to write down "these propositions," according to which Yahweh has made a covenant with Moses and Israel; "He [referring to either Yahweh or Moses] wrote [in Moses' presence] on the tablets the propositions of the covenant, the ten propositions."<sup>58</sup>
- W8 Betsalel and Oholiav write, "Holy to Yahweh" on Aaron's crown.<sup>59</sup> (Yahweh had instructed Moses to order Betsalel and Oholiav "to engrave," not "to write."<sup>60</sup>)

The ten references, broken as they are by the crisis of the golden calf into two sets of five, form the following array:

<i>Before</i>		<i>During</i>		<i>After</i>
W1	W2	Golden	W5	W8
	R	Calf	E	
	W3	Crisis	W6	
	W4		W7	

W1 occurs in Refidim, just prior to the Mt. Sinai episodes. W8 occurs just after Moses descends the mountain for the last time. W2 through W4 (including R) occur during the meetings prior to the crisis. W5 through W7 (including E) occur during the meetings after the crisis.

#### READING THE REFERENCES TO WRITING

The content of the references suggests a pattern of appositions. Read the sequence in pairs from outside in, as one would remember them, looking backwards, having finished reading the text:

1. W8 - W1
2. W7 - W2
3. W6 - R
4. E - W3
5. W5 - W4

A reading from memory<sup>61</sup> suggests that people can come to regard what Elohim "engraves," either on the tablets or in creating the world, as writing, if they actively collaborate with Yahweh. They collaborate with Yahweh by writing—by listening to an inner voice, by

<sup>58</sup> XXXIV, 27-28. The last book (remembering the event in the form of writing, as opposed to writing a memory of the event, as in the second book) resolves the ambiguity in favor of Yahweh. Propositions, X, 4.

<sup>59</sup> XXXIX, 30.

<sup>60</sup> XXVIII, 36.

<sup>61</sup> We will learn, or have already learned by reading the first reference to writing preceding the revelations at Mt. Sinai, that to read from memory is to read a record. See *infra* text accompanying notes 89-103.

reading the writing of their actions to an inner ear. They also collaborate with Yahweh by reading and rewriting. All three collaborations—writing, reading, and rewriting—are made possible by “erasure.” Erasure rescues writing from the idolatrous threat of engraving.

### 1. Engraving Becomes Writing (W8-W1)

The apposition of W8 with W1 suggests that the drama at Mt. Sinai taught the people to regard engraved patterns of words as writings rather than as graven images, or idols. Written words do not complete creation. They are constituents of further creations. The “subjects” of rules should not regard them as commands backed by sanctions. They are further propositions in ceaseless conversation.

W1 records Yahweh’s command to Moses to write a record of the battle with Amalek. It does not record Moses obeying the instruction. It does, instead, record Moses constructing an altar to memorialize the battle, which he names: “Yahweh is my banner.”<sup>62</sup> W8 records Betsalel and Oholiav obeying Yahweh’s instruction “to engrave” “Holy to Yahweh” on a plate to be worn by Aaron.<sup>63</sup> But they do not engrave, they “write.” Hence, W1 records Moses’ delay in obeying Yahweh’s instruction to write, and W8 records Betsalel and Oholiav obeying Yahweh’s instruction “to engrave” by writing instead of engraving. Moses’ “delay” for forty days in delivering Elohim’s writing of the ten propositions had fomented the crisis of the golden calf, in which the people reverted to making graven images. Moses’ second “delay” for forty days, during which Yahweh and he write, allows Betsalel and Oholiav to regard engraving as writing rather than a graven image, or idol. Moses has rescued writing from engraving.

### 2. Writing as Collaboration: Inspiration (W7-W2)

The apposition of W7 with W2 begins a contrast of collaborative writing with writing on one’s own, without textually explicit authority. The W7-W2 apposition captures the first of three collaborations: inspiration. (The W6-R apposition will capture the others: reading and rewriting.) Writing requires collaboration with Yahweh. It requires a voice, an ear, even prior to reading. This collaboration is the inner voice, the inner ear, of writing. Writing requires inspiration.

W2 records Moses writing “all Yahweh’s propositions” during

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<sup>62</sup> XVII, 15.

<sup>63</sup> XXVIII, 36.

the meeting on the slopes of Mt. Sinai in a "book of the covenant." It does not record Yahweh instructing Moses to write this book. Moses' book was all the people had, when Moses disappeared on the mountain for forty days. The authority of the book, which Moses wrote on his own, was not enough to keep them from making the golden calf. W7 records Yahweh commanding Moses to write down "these propositions," according to which Yahweh has made a covenant with Moses and Israel. W7 also records "he," referring either to Moses or Yahweh, writing down "the propositions of the covenant, the ten propositions." Hence W2 records Moses writing, without recording Yahweh's command to write. W7 records Yahweh's command to write, leaving an ambiguity whether Yahweh or Moses is writing. Moses writes on his own in W2. The writing in W7 is a collaboration. It is not an explicit collaboration. (Moses does not say that Yahweh and he wrote together.) It is a collaboration signified by the ambiguity in the text. It is textual collaboration.

### 3. Writing as Collaboration: Reading and Rewriting (W6-R)

The apposition of W6 with R captures the second and third collaborations. The writer's audience collaborates with the writer by reading. Readers always rewrite texts. Writing too is a reading, a rewriting of texts already written. Writing collaborates in a tradition.

R records Moses reading the book he has written on his own, aloud to the people. W6 records Yahweh offering to "rewrite" the ten propositions that were on the first set of tablets, "which you broke." Moses' reading, like Yahweh's offer, is a rewriting of matters already written. The writing Moses reads—containing the legal rules—supplements and substitutes for the ten propositions. Moses' writing is itself a "reading" of the spoken propositions. It is a rewriting of them as rules. Yahweh's rewriting of Elohim's broken tablets constitutes a reading—a rewriting—of the rules, to restore the propositions. The rewritten propositions are Yahweh's, not Elohim's. The R-W6 apposition folds into the W2-W7 apposition: rewriting, hence reading, is a species of collaboration.

### 4. Collaborative Writing Flows From Erasure (E-W3)

The apposition of E with W3 suggests that reading and rewriting, the second and third collaborations involved in writing, flow from erasure.

W3 records Yahweh offering the first tablets of stone, upon which He has already written "the doctrine and the commandment." The writing, W4 and W5 will reveal, is the writing of Yahweh as



Elohim. E records Moses asking Yahweh to erase him from the book Yahweh has written, if Yahweh will not forgive the people for the sin of the golden calf.<sup>64</sup> The writing in W3 has already been written, prior to Yahweh's delivery of the writing to Moses. Moses' request for erasure in E suggests the possibility that the writing Elohim has already written can be erased, rewritten by Yahweh. Moses shows that Elohim's writing can even be destroyed altogether.

#### 5. Engraving: Writing That Is Not Erasure (W5-W4)

The apposition of W5 with W4 suggests that collaboration between Moses and Yahweh, the first collaboration involved in writing, rescues writing from the threat that people will regard it as engraving. Moses demonstrates the possibility of collaboration with Yahweh by smashing—by erasing—Elohim's writing.

W4, immediately before the crisis of the golden calf, records Yahweh's delivery of the writing, "written with the finger of Elohim." W5, immediately after the crisis, states that "the writing was the writing of Elohim, graven on the tablets." The crisis of the golden calf causes Moses to regard Elohim's writing as a sort of engraving. The writing is not a graven image, but the people could confuse it with one. Moses thereupon fails to deliver it to the people. He breaks it, just as he breaks the golden calf.

The innermost apposition returns to the outermost: Betsalel's and Oholiav's reworking of Yahweh's command "to engrave" into "to write" is proof that the people need not regard writing as engraving.

Now read the series of appositions the other way, from inside out, as one discovers them during the drama of reading.<sup>65</sup>

1. (W5-W4) The people will regard writing that is not a product of erasure as an engraving, a graven image, an idol.
2. (E-W3) Reading and rewriting are two sorts of erasure.
3. (W6-R) Reading and rewriting are collaborative in two senses. To read is to collaborate as audience. To write is to rewrite, hence to collaborate with tradition.
4. (W7-W2) The act of writing requires collaboration with Yahweh, or inspiration.
5. (W8-W1) If writing collaborates in all three senses, then the people will not regard it as an engraving, a graven image, an idol.

<sup>64</sup> XXXII, 32. See *infra* text accompanying Notes 66-79.

<sup>65</sup> We will learn, or, as we shall see, have already learned by reading the Amalek episode, to regard "forward reading" as "creative memory," acting as if one is in the process of creating a record. See *infra* text accompanying notes 89-103.

The struggle over writing in *Names*—between Elohim and Yahweh, between Yahweh and Moses—rescues it from idolatry. The struggle supplies the necessary collaborations. To write is to rewrite. To rewrite is to erase. To erase is to rescue writing from idolatry.

The theme has a legal formulation. When Elohim speaks the ten propositions, the people are too frightened to understand them. When Elohim writes the propositions, Moses must smash the writing so that the people do not bow to it as an idol. Moses will not let the people read Elohim's writing, because they will bow to it as an idol. They will not rewrite its contents in deeds. Elohim's writing is superfluous, since Elohim has already written—spoken and by speaking created—the propositions in creation. But the propositions cannot serve as propositions, unless Yahweh, not Elohim, rewrites them in collaboration with Moses. Short of a collaborative rewriting of the propositions—by Yahweh/Moses on the top of Mt. Sinai and by the people in deeds—Yahweh specifies the propositions as rules backed by sanctions. The people fear sanctions. They cannot collaborate with Yahweh.

Moses considers that he must record the rules in writing. He writes without authority clearly indicated in the text—with inspiration, but without the collaboration of the people. He will let the people read the propositions only once they are written for a second time, ambiguously by Yahweh/Moses. The people will not regard the second writing, the rewriting of a writing they saw Moses smash, as an idol. They will read the propositions, rewrite them in deeds, use them as further propositions in conversations with Yahweh.

#### MOSES' LAW: THREE WRITINGS

The revelation of law in *Names* requires not one, but three writings. The first is Elohim's writing—the world, along with the laws of the world, as a finished, created product. The second is Yahweh's collaborative writing—human deeds continuing creation. The third is Moses' writing, which records the struggle over the first two. It is the writing Moses delayed—the record Yahweh commanded Moses to write at Refidim. It is the writing Moses does not explicitly say he wrote with clear authority—the writing of rules backed by sanctions. It is dangerous writing.

To require fewer than three writings to make law is not to have Moses' law. Other legal systems do require fewer than three writings. Naturalism requires only one (or perhaps two, a writing and a reading). Positivism requires two, a procedure for marking rules as law and the actual marking of rules according to the procedure. Moses' is

not the only legal system to require three writings. The common law system in force today in the United States does so, as does the rights jurisprudence of theorists such as Hobbes.

Moses' two forty-day sojourns at the top of Mt. Sinai recall Noah's forty-days in the ark. During Noah's sojourn, Elohim "erased all existing things",<sup>66</sup> because Elohim saw that flesh was degenerate and filled the earth with violence.<sup>67</sup> After Noah built an altar to Yahweh, "Yahweh said in His heart: I will not curse the ground any more for the sake of man."<sup>68</sup> He reconstructed physical and moral order. He gave Noah a code resembling "law."<sup>69</sup> Noah's "code" binds, hence defines, all humanity. This most primitive law—so primitive that it does not merit any of the terms Moses ordinarily uses for law<sup>70</sup>—expresses Yahweh's regret for erasing all existing things. It prohibits murder and eating live animals—nothing more. Yahweh did not call Noah back for a second forty days. Noah thus learned only one of the propositions by which Elohim rules creation—the one against murder—and none of the rules. Moses, by contrast, learns all the propositions. He learns rules.

Yahweh uses the same word, "degenerate" (*sheeh.et*), to describe the idolaters of the golden calf.<sup>71</sup> The word means "that which is reversing creation," "destroying," "de-constructing." The English "destroy" derives from the Latin "*struere*," to "pile up" or "construct."<sup>72</sup> So "destruction" is "deconstruction." Elohim thus tells Noah that he will "*mashh.eetam* [destroy, deconstruct] all flesh [*basar*]."<sup>73</sup> Instead, Yahweh "erased [*yayeemah*.] all existing things."<sup>74</sup> To "erase" is to leave without record. Yahweh did not "destroy" the degenerate flesh, as He proposed, but rather "erased all existing things"—left them without record.

Yahweh threatens—not to destroy, not to erase—but to "*akhalem*"—"annihilate"—the idolaters.<sup>75</sup> To "annihilate" is to turn into nothing, to deprive of material substance. To "destroy" is to reverse creation to its primordial state, which was "the breath of Elo-

<sup>66</sup> In the Beginning Of, VI, 7; VII, 4; VII, 23.

<sup>67</sup> In the Beginning Of, VI, 11-13.

<sup>68</sup> In the Beginning Of, VIII, 20-21.

<sup>69</sup> In the Beginning Of, IX, 1-17.

<sup>70</sup> See *supra* note 23.

<sup>71</sup> XXXII, 7.

<sup>72</sup> See 3 The Oxford English Dictionary, "destroy," at 260 (1970).

<sup>73</sup> In the Beginning Of, VI, 13.

<sup>74</sup> In the Beginning Of, VI, 7; VII, 4; VII, 23.

<sup>75</sup> XXXII, 10 and 12.

him" and "water."<sup>76</sup>

Moses' request for Yahweh to "erase" him from the book if Yahweh does not forgive the idolaters (E) powerfully recalls the Noahide erasure.<sup>77</sup> It also recalls Moses' first reference to writing in *Names*, in which Yahweh tells Moses to write the battle with Amalek in a book, "for I will utterly erase the memory of Amalek from under the heavens."<sup>78</sup>

To erase is to kill by depriving of a record. "Moses," Moses tells us, means "pulled out from water."<sup>79</sup> So Moses, like all Elohim's creation, is "pulled out" from the water. Moses, pulled out from the water, is rewriting creation, drawing all existing things from the erasing waters of the flood. Moses does not regenerate, reconstruct creation. By writing—by creating alphabetic writing—he rescues the memory of creation from erasure. He does not draw pictures or symbolize creation. He makes a record of it.

Who pulled Moses from the water? Not "the breath of Elohim," as in creation, but Pharaoh's daughter. In fact, Moses was a product of a union that his own rules would come to call "incestuous."<sup>80</sup> Amram, Aaron's and Moses' father, married Yokheved, Amram's aunt and Aaron's and Moses' mother.<sup>81</sup> Moses' mother was his great-aunt. (By writing a record, Moses reconstructs moral order, forbidding incestuous unions.) Moses was the product of a quasi-pharaonic union, since Pharaoh's mother was always supposed to be his aunt. But Moses was adopted by Pharaoh's daughter. So Moses' adoptive great-aunt was his adoptive grandmother. Was his adoptive great-aunt his real mother? Was Moses a future Pharaoh?

Freud argues that Moses was a future Pharaoh, and that the Israelites killed him in the desert.<sup>82</sup> He has it backwards. The text is not hiding the secret that Moses was an Egyptian prince. Moses is telling us that he risked setting up as Pharaoh. Just before Moses asks

<sup>76</sup> In the Beginning Of, I, 2. Or, to "destroy" is to return creation to thought and extension.

The text also offers the other logical formulation of "destruction." Yahweh "destroyed," In the Beginning Of, XVIII, 21, etc., Sodom and Amorrhah with "sulphur and fire." In the Beginning Of, XIX, 24. Fire deconstructs creation to the other elemental substance, the "breath of Elohim."

<sup>77</sup> See supra text accompanying note 64.

<sup>78</sup> XVII, 14. See infra text accompanying notes 89-103.

<sup>79</sup> II, 10. From the root *mashah* (to pull out from water).

<sup>80</sup> He Called, XVIII, 13.

<sup>81</sup> VI, 20.

<sup>82</sup> S. Freud, *Moses and Monotheism* (1939). On the links between Freud's thesis and his discovery of psychoanalytic interpretation, see Susan Handelman's extraordinary work. S. Handelman, *The Slayers of Moses: The Emergence of Rabbinic Interpretation in Modern Literary Theory* 129-53 (1982).

Yahweh either to forgive the sin of the golden calf or erase him from Yahweh's book, Yahweh made a tempting offer to Moses:

Now leave Me alone. I will be furious with them. I will annihilate them, and make you a great nation.<sup>83</sup>

Moses did not let Yahweh alone. Instead, he persuaded Yahweh not to annihilate the Israelites. He resisted the pharaonic temptation. After all, the Egyptian political model was the only one the Israelites knew after 430 years. The highest political drama of the text is whether Moses will become a new Pharaoh. He did not. He created a new political model based on law—based on rules drawn from conversations with Yahweh. He rejected the pharaonic model, based on slavery.

Moses' text describes the extraordinary power of the pharaonic temptation quite frankly. Shortly after Moses records Yahweh's fury and His offer, Moses records Moses' reaction: Instead of threatening to annihilate the Israelites, he broke Elohim's tablets:

And then, when he came close to the camp, and saw the calf and the dancing, Moses became furious, and he cast the tablets out of his hands, and he broke them beneath the mountain. And he took the calf which they had made, and he burned it with fire, and he ground it thin, and he sowed it on the face of water, and made the children of Israel drink it.<sup>84</sup>

Moses records himself having the same reaction as Yahweh. He was furious. Instead of threatening to annihilate the Israelites, he broke Elohim's tablets. He then turned to the calf, burned it, ground it thin, sowed it on the face of water, and made the people of Israel drink it.

This strange "turn," from destruction of the tablets to destruction of the calf, tactfully accomplishes three poetic goals. First, by burning, grinding and sowing the calf in water, Moses does to the calf exactly what Yahweh threatened: he "destroys" the calf—through fire, grinding and sowing (a word of rebirth!)—to water, and "annihilates" it by making the people drink the water.<sup>85</sup> Moses does to the calf what Elohim did not do to "all flesh" in the time of Noah, and what Yahweh did do to Sodom and Amorrhah through fire. Second, the burning, grinding, sowing and drinking are exactly what Ugaritic (pre-Hebraic) god-kings did to sacred objects when the people failed

<sup>83</sup> XXXII, 10.

<sup>84</sup> XXXII, 19-20. Blanchot has recognized the significance of Moses' destruction of the first set of tablets and the two writings in his "L'Absence du Livre," first published in *L'Entretien infini* (1969). See M. Blanchot, *The Absence of the Book*, in *The Gaze of Orpheus* and other literary essays, *supra* note 9, at 145-60.

<sup>85</sup> Though apparently false etymology, the Hebrew word for "eat" (*akhal*) is similar to the word for "annihilate" (*khalah*).

to receive them with proper enthusiasm.<sup>86</sup> Moses here records himself unconsciously performing the actions of an Ugaritic god-king. Third, Moses stops himself from completing these actions on Elohim's tablets. He turns his rage—appropriately, realistically—to the calf. The entire scene powerfully establishes Moses' unreflective, furious imitation of a known local god, even after he has rejected Yahweh's tempting offer.

Until Sinai, collaboration with Yahweh remained limited after the flood. Elohim still ruled creation, "unconsciously." Yahweh brings Elohim's propositions to consciousness: He propounds them to Moses as rules. The propositions cannot work strictly in Elohim's manner, as rules of nature, of human nature. They can work only if consciousness possesses them, only if people use them in conversations with Yahweh.

Humans do not administer propositions. The sanctions attached to them are sanctions in the order of nature. Tribunals enforce only certain propositions. Humans do administer rules. Yahweh asks humans to supplement the natural sanctions of the propositions with legal sanctions according to rules. People must talk about rules. They must use them, work with them, appreciate their link to the propositions. The rules are Elohim's propositions carried on, specified, and transformed in conversations with Yahweh. Rules supplement propositions. They are further propositions. They are dangerous propositions.

After Yahweh regrets wanting to annihilate the Israelites, Moses goes back to the top of the mountain for a second forty days. He enlarges Yahweh's realm. The first sojourn had not rescued Elohim's propositions from the unconscious. The people who made the golden

<sup>86</sup> Compare the Baal Epic:

With a sword split them asunder, with [another weapon] winnowed them, hacked them to pieces, scattered them, by fire burnt them, ground them, sowed the flesh in the field, portions to be eaten by birds.

Translated by Rabbi Marvin Petruck from the Ugaritic text in C. Gordon, *Ugaritic Textbook, Texts in Transliteration: Cuneiform Selections*, IABII, at 168, col. A (1965). For a poetic translation, see *Ancient Near Eastern Texts Relating to the Old Testament*, IABII, lines 31-35, at 140 (J. Pritchard ed. 3rd ed. 1969):

With sword she [Anat] doth cleave him [Baal].  
With fan she doth winnow him—  
With fire she doth burn him.  
With hand-mill she grinds him—  
In the field she doth sow him.

Birds eat his *remnants*,  
Consuming his *portions*,  
*Flitting from remnant to remnant*.

Baal, of course, was the god of the golden calf.

calf because Moses delayed his return from the top of the mountain were prepared only to make idols, to make rules as idols. They were not prepared to use rules as further propositions, to recognize the "delayed" authority of rules as every judge (*el*) makes and uses them—always after the behavior the rule seeks to rule. Moses persuades Yahweh to regret His offer to annihilate the Israelites and start over, pharaonically, with Moses' descendants. By rejecting the temptation to be Pharaoh, Moses collaborates with Yahweh in completing creation.

Moses' rejection of the pharaonic temptation demonstrates tolerance for the delay of the people in accepting Yahweh's covenant, even before Yahweh tolerates the delay. Moses teaches Yahweh and the people to tolerate delay—the people's delay, Moses' delay and the delayed authority of rules. Moses thus creates a consciousness—a delayed authority—of Elohim's propositions. Consciousness of propositions is conversation with Yahweh about rules. Men and women, now conscious that Elohim's propositions are rules they themselves must administer, are more perfect "images" of Elohim, as Elohim created them to become "in the beginning of" creation. Elohim too has changed, according to Moses' image. He is more Yahweh, tolerating delay.<sup>87</sup>

The rules humans administer as further propositions cannot successfully be written in fewer than three writings: Elohim's, Moses', and Yahweh's.

To write law only once is to get only Elohim's propositions. These are unconscious, hence incomplete. The people on their own cannot specify them or take responsibility for administering them as rules. Natural law is law written without delay, only once, by Elohim. (Natural law is written twice, if we count reading nature as a writing. But if natural law admits that the reading is a writing, it probably remits to positivism, the jurisprudence of two writings. The matter is quite complicated.) But natural law is not Moses' law.

To write law twice is to get the rules Moses wrote. It is to tolerate some delay. The people will administer rules as idols, and obey them out of fear of sanctions. Ordinary people will not use the rules as premises for action. Ordinary rulers will not administer them as further propositions. Positive law is law written only twice, by humans such as Moses. It is not Moses' law either.

Moses' law needs three writings: Elohim's propositions defining perfection in action; Moses' further propositions assisting humans to

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<sup>87</sup> See *supra* note 13.

achieve the perfection of Elohim's propositions; and Yahweh's rewriting of Elohim's propositions providing standards propelling the further propositions even further towards perfection.

Moses' law poses rules as instruments to assist humans to realize Elohim's propositions. It also puts rules in play, opens them to change through consciousness, through ceaseless collaboration of the people with Yahweh. Law requires both movements: posing rules and putting them in play. To deny one or the other is not to know Moses' law. It is not to know law altogether.<sup>88</sup>

Legal traditions (and the traditions interpreting Moses' rules are no exception) take a host of positions on these two necessary movements, posing rules and putting them in play. Some try to suppress the need to pose rules, favoring instead assessments of character and moral education. Others try to suppress putting rules in play by various well-known devices. One such device distinguishes between the rule and its applications: conditions have changed, they say, not the rule. Another device points to the ambiguities, imprecisions, and dynamism of language: we are interpreting the rule, they say, not changing it. There are others.

No legal tradition, however, has successfully eliminated either movement, posing rules or putting them in play. Though pragmatic considerations seem to favor retaining both, the heart of the matter is not pragmatic. Every legal tradition supports a struggle over rules, because the struggle over rules defines the moral situation of the legal person. To be a person is to engage in struggle over rules. Persons are not creatures, herded by rules into neat, eternal categories. Persons do not obey rules out of fear of sanctions. They engage rules—put them in play in action.

Positivism and naturalism suppress the character of persons engaging the struggle over rules. Positivism asserts that the struggle is irrelevant, beside the point, a private matter. Naturalism asserts there is no struggle. Moses, I believe, does not at all reject the struggle over rules. He is neither a naturalist nor a positivist.

Each of the writings in *Names* erases the other two. Each is written as an erasure. Elohim's writing rules all of creation. It leaves no room for writing as collaboration—Yahweh's writing and Moses'. It

<sup>88</sup> I am specifically not taking a positivist perspective here, which always tempts any observer of a legal system or other facts. A positivist perspective would regard putting rules in play as amending or ousting them. A positivist legal system would be "frank" (positivists are always "frank") about putting rules in play. That is one perspective. Nor do I reject the positivist perspective. It just does not supply the appropriate language to "play" non-positivistic legal systems, such as Moses'. One cannot be a persuasive positivist lawyer in Moses' system. One could in a positivist system.



deprives Moses' writing of authority. Yahweh's writing replaces Elohim's engraving. Yahweh erased the "existing things" in Noah's time, will erase Moses himself, and will erase Moses' rules in collaboration with future generations. Moses' writing, not Elohim's or Yahweh's, is the only record of the drama at Mt. Sinai.

Yahweh depends on Moses to write the record. Moses earns the right to write the record by his God-like anger at Aaron's engraving of the golden calf. He earns the right by destroying Elohim's engraving. He earns it by tolerating delay, by teaching Yahweh and the people to tolerate delay, and by rejecting the temptation to be Pharaoh. Moses earns the right to write by collaborating with Yahweh in erasure.

#### THE BATTLE WITH AMALEK: MAKING A RECORD

Moses, like Yahweh, erases. What does he erase? How does he erase it?

Moses erases the immediate experience of events. He erases the rule of immediate experience, the rule of presence. He erases the rule of rulers, such as Joshua, in collaboration with Yahweh. He erases the rule of Elohim—the realm of immediate experience, the realm of presence. He makes a record.

The themes we learn from the pattern of Moses' references to writing turn us to the first reference, Yahweh's command to record the first battle of the slave army after their departure from Egypt. Moses writes (W1):

And Yahweh said to Moses: Write this to remember it in the book, and put it in the ears of Joshua, for I will utterly erase the memory of Amalek from under the skies. And Moses built an altar, and he called the name of it "Yahweh is my banner." And he said: The hand upon the thro[ne] of Yah[weh], Yahweh will have war with Amalek from generation to generation.<sup>89</sup>

The text records Yahweh's command to Moses to record the battle with Amalek in a book. We cannot be sure from Moses' description whether Yahweh is commanding him to record the battle in a book Moses has already begun on his own, or whether Yahweh is now directing Moses to begin the book upon the occasion of the battle. Either way, we may infer that the book Moses refers to here is just the *Five Books*. (Moses will continue writing this book all through the rest of the narrative, finishing it only just before his death in the last

<sup>89</sup> XVII, 14-16. The brackets in "throne" and "Yahweh" are an attempt in English to mimic the omitted portions of the words in the Hebrew text. The word "nissi" refers ambiguously to both "banner" and "miracle."

book.)<sup>90</sup> If the inference is correct, then Yahweh's command to "write . . . in the book" is Moses' first reference to writing the book in the book that he is writing.

We know that Moses did obey Yahweh's command (we are reading the book), but we do not know when. Moses does not record, as he might, that he wrote in the book the very moment Yahweh commanded. The next mention of writing (after Moses' fourth meeting with Yahweh, on the slopes of Mt. Sinai, when Yahweh presents the rules) does record Moses writing, but does not say Yahweh commanded it. Has Moses finally obeyed Yahweh's command, at Mt. Sinai rather than Refidim? If so, he has delayed. He may also have differed with Yahweh, since Moses does not record Yahweh commanding him to write the events—most importantly the rules—between Refidim and the fourth meeting at Mt. Sinai. If Moses has indeed deferred obeying Yahweh's command or differed with it, this would be only one amongst a series of deferrals and differences during the sojourn at Mt. Sinai.

Yahweh accompanies the command to write with a command to put the record in the ears of Joshua. This is strange for two reasons. Joshua was the leader of the Israelite forces. Why would Yahweh command Moses to put the record of the battle in Joshua's ears when Joshua was present at that very battle? Also, Yahweh commands Moses to write in order to remember, and then tells Moses, "I will utterly erase the memory of Amalek." If Yahweh wished to erase the memory of Amalek, why preserve the record in a book "to remember"? The first mention of writing in the *Five Books* thus sets two paradoxes. The first is a paradox of presence: Yahweh asks Moses to put the record of the battle in Joshua's ears, even though Joshua was present at the battle. The second is a paradox of erasure: Yahweh asks Moses to record the battle with Amalek to remember it, while planning to erase the memory of Amalek.

Moses' paradox of presence marks all writing, not just the writing Yahweh commanded Moses in Refidim. Writing changes *what* we remember, and the *way* we remember it. We write in order to remember what we wish or fear to forget. Writing to remember is writing to forget—to forget in order to be reminded by the writing. To remember through the written record of an event is to forget the immediate experience of it. Writing erases immediate experience. Yahweh commands Moses to put the record in Joshua's ears in order to replace Joshua's immediate experience with Moses' record. Joshua's experi-

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<sup>90</sup> Propositions, XXXI, 24.

ence, after all, is Joshua's, not Moses'. Putting the record in Joshua's ears is the education of Joshua to Moses' perspective. The record commands a perspective. Moses writes in order to forget or to cause others to forget—to command a perspective.

What is the difference between Joshua's perspective and Moses'? Joshua is a commander, after all, like Pharaoh or any other ruler. Moses is a prophet, as well as a ruler. He speaks with Yahweh. Joshua's immediate experience of the battle was undoubtedly that *he* won the battle, because his skills and personality were commanding. If Joshua believes this, he has the wrong perspective. Only Elohim rules. Joshua's command is Elohim's. That is the correct perspective, the one Moses puts in Joshua's ears.

"Elohim rules and not rulers" is not a completely correct perspective. Elohim rules through immediate experience. Joshua was a talented commander, and he was absolutely correct to believe that his deeds were crucial to victory. (Moses does not advocate oriental fatalism.) Rulers do rule, after all. "Elohim," "Rulers," is plural. Yahweh does not tell Moses to "erase" Joshua's experience, only to supplement it. Joshua has the experience of ruling—he commands the army and leads it to victory—supplemented by the experience of Moses' record. Moses makes removing Joshua from the immediate experience of ruling into one of Joshua's experiences. The record does not destroy Joshua's experience. The record only memorializes it.

Memory too forms part of experience. We experience remembering. Unlike Plato, however, Moses held that remembering does not form all of experience. Change need not be only disintegration. Moses, unlike Plato, is interested in the God-like virtue of freedom. Elohim's creation is incomplete, because human freedom is part of creation. Collaboration with Yahweh—conversations with Yahweh, self-consciousness—completes creation. Moses might agree that remembering forms all of experience, so long as remembering includes reference to the possibility of creation. Creative memory—the memory Moses wishes to pursue—is remembering the present as if one were already living in the future. Ordinary memory is memory of the past from the point of view of the present. Ordinary memory rules the present, weighs it down with the past. Ordinary memory treats creation as complete. It is "*elohim*" memory. Moses wishes to convert Joshua from ordinary memory to Yahweh's creative memory—living in the present as if one is remembering it from the future.<sup>91</sup>

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<sup>91</sup> When Moses first met Elohim, at the burning bush in Midian, he said:  
When I come to the children of Israel, and I say to them: The Elohim of your  
ancestors has sent me to you; and they say to me: What is His name? what shall I

Moses puts a record in Joshua's ear, the record Yahweh orders Moses to put there. Joshua's education draws him away from the "elohim" perspective—the perspective of rulers—to the collaborative perspective of Yahweh. It teaches Joshua the experience of memory. It accustoms Joshua to experiencing events as if they were memory. The correct perspective, Yahweh's perspective, is that by participating in events Joshua is creating a record. His own, casual recollections of events will not form the basis of that record. Joshua must act knowing that he is collaborating with Yahweh in making a record.

Moses' solution to the paradox of presence is the erasure of casual recollections in favor of memory. A record replaces casual recollection with a single, recorded memory. The correct perspective is a record drawing participants in an event away from immediate experience and casual recollection. The truth—that Elohim rules, not Joshua—appears only in a record. Removal from events supplements experience. Records create memory. They do not erase experience. They make memory into experience. Those present at events then live them from the perspective of memory. They write events. The writing supplements (is) the experience. It is experience as the erasure of experience.

The very next scene in the text—Moses building and naming an altar to memorialize the battle—directly takes up Moses' second paradox, the paradox of erasure.

The name Moses gives the altar—"Yahweh is my banner"—is an instance of erasure: the overt erasure of a name, rather than the covert erasure of experience in a record. To say, "Yahweh is my banner," is to say that Moses does not have a banner—a sign, a rallying point for his troops—in the ordinary sense. Yahweh, not an object, is his banner. Moses' sign in battle is not a sign as we understand it.<sup>92</sup> Moses rallies and leads his troops with an invisible banner. Also, his name for the altar is not a name in the ordinary sense. It is a phrase, not a name. It is a phrase that denies its own content. To say, "Yahweh is my banner" is to say, "I have no banner in the ordinary sense." Moses gives a name to the altar that is not a name, and the name itself denies that it is a name.

The theme of the "anti-name" for the altar continues: "And he

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say to them? And Elohim said to Moses: I Will Be What I Will Be; and He said:

Thus shall you say to the children of Israel: I Will Be has sent me to you.

III, 13-14. Elohim leaves out the past and the present from the report Moses is to give of His name. Elohim thus tells Moses to draw the people away from their present and past as slaves. They should regard Elohim as future only.

<sup>92</sup> Nor as Moses understood it at the burning bush, when he asked God for material, miraculous signs. IV, 1-9.

said: The hand upon the thro[ne] of Yah[weh], Yahweh will have war with Amalek from generation to generation." Moses' text fails to complete two words, "throne" and "Yahweh." The text, if not the speech it records, is incomplete. Rashi interprets Moses' omissions as a statement that Yahweh's name and throne will not be whole until the name "Amalek" is completely erased.<sup>93</sup> (Joshua "weakened" Amalek, he did not destroy him.)<sup>94</sup> Moses preserves the name "Amalek" in a text, so that future generations can finish destroying Amalek. The text commands the Israelites to repeat the recorded event: future generations will fight Amalek, because they read Moses' record. But the text itself, which is necessary for the destruction of Amalek, preserves the memory of Amalek by virtue of the very command to erase it.

Records allow or command future generations to repeat events recorded in the record. Without a record, the events will be forgotten, or not remembered according to the correct perspective. The events that will be repeated are not the events individual participants personally remember: they are events recorded according to the perspective established by the record. Amalek's memory has disappeared into the record. Moses' solution to the paradox of erasure is that the record erases the memory of Amalek by preserving it in a record hostile to Amalek. The record preserves the erasure of Amalek's perspective.

Moses' record of the battle with Amalek transforms the individual recollections of participants in the battle into a collective recollection, into a memory. The collective recollection will completely take over only once the actual participants, with their own stories, have died out or lost practical interest in recounting them. The collective recollection springs to life in future generations. Collective recollection depends on writing and upon the death or inactivity of participants in the events recorded in the writing.

The incomplete name "Yah" invites us to recall the only other instance Moses uses it in his writing. Moses and the Israelites sang, "Yah is my strength and song," after Yahweh, collaborating with Moses, drowned Pharaoh's troops in the Red Sea.<sup>95</sup> The song is a song of joy to the victory of Yahweh over Pharaoh. The victory required little collaboration from the Israelites. Moses' record of the song makes no mention of writing. Moses' last reference to writing, in *Propositions*, records Yahweh's command to Moses to write the words

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<sup>93</sup> Rashi's Commentary, Names, XVII, 16.

<sup>94</sup> XVII, 13.

<sup>95</sup> XV, 2.

of a darker song, recording the difficult victory of Yahweh's collaboration with the people:

Now therefore write for yourself this song, and teach it to the children of Israel. Put it in their mouths, that this song may be for Me a witness of the children of Israel.<sup>96</sup>

(Moses has just referred to reading.)<sup>97</sup> Moses records that "Moses wrote this song at that day."<sup>98</sup> He records that Moses charged Joshua to be strong, and to bring the Israelites into the land He swore to them.<sup>99</sup> He records that "Moses had finished writing the propositions of this doctrine in a book."<sup>100</sup> He records that "Moses spoke the propositions of this song in the ears of all the assembly of Israel until they were done."<sup>101</sup> He records Moses speaking the propositions of the song.<sup>102</sup>

The last reference to writing in the *Five Books* thus shows Moses obeying Yahweh's command to write, which the first reference to writing in the *Five Books* omitted. The last reference shows Yahweh commanding Moses to write a song, where the first shows Yahweh commanding Moses to write a record of strength. The first reference ties the song of Yahweh's strength only indirectly to writing by the incomplete name, "Yah." The last reference links the song of collaborative strength directly to Moses' writing. The first reference is Yahweh's command to put the song in Joshua's ears. Joshua's role in the writing is passive. The last reference is Yahweh's command to put the song in the people's mouths. The people's role in the writing is active.

The last reference is flanked by Joshua's strength and the beauty of a song. Because the song is beautiful, it will testify to the people as a witness.<sup>103</sup> These will be the defenders of Moses' doctrine, Joshua's strength and the people's song. Deeds complete the incomplete record of Yahweh's name through strength. The record bears witness to the incomplete deeds of Israel through beauty.

### THE DEED OF WRITING

Moses' first mention of writing establishes the significance of a

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<sup>96</sup> Propositions, XXXI, 19.

<sup>97</sup> Propositions, XXXI, 11 ("you shall read this doctrine before all Israel in their ears").

<sup>98</sup> Propositions, XXXI, 22.

<sup>99</sup> Propositions, XXXI, 23.

<sup>100</sup> Propositions, XXXI, 24.

<sup>101</sup> Propositions, XXXI, 30.

<sup>102</sup> Propositions, XXXI, 30 - XXXII, 43.

<sup>103</sup> Propositions, XXXI, 21.

record. His second mention establishes the significance of writing as an act or deed.

The second mention directly follows Moses' fourth meeting with Yahweh, the first meeting off the top of the mountain, in which Yahweh presented him with the rules (W2):

And Moses came and told the people all Yahweh's propositions and all the rules. And all the people answered with one voice and said: All the propositions Yahweh has spoken we will do. And Moses wrote all Yahweh's propositions, and rose up early in the morning and built an altar beneath the mountain and twelve monuments according to the twelve tribes of Israel.<sup>104</sup>

The passage records Moses' only clear reference to his own act of writing. Moses reflects here on writing as an act or deed. The author of a text writes about writing the text—witnesses writing the text in the text—in order to establish its authority. Self-witnessing writings in law—acts, wills, deeds—seek to establish the legal authority of the writing. Moses' writing is an act or deed, since it too seeks to establish its authority by witnessing its own writing.<sup>105</sup>

The only other possible reference to Moses actually writing occurs in the next-to-last mention of writing in *Names*, at the end of Moses' final meeting with Yahweh on the top of Mt. Sinai (W7):

And Yahweh said to Moses: Write these propositions, because on the basis of these propositions I have made a covenant with you and with Israel. And he was there with Yahweh forty days and forty nights. He did not eat bread and he did not drink water. And he wrote on the tablets the propositions of the covenant, the ten propositions.<sup>106</sup>

This last passage too is ambiguous—intentionally, we must assume—both as to the content of the writing on the tablets and as to who did the writing. When Yahweh says "write these propositions," He is undoubtedly referring to the commands of a covenant Yahweh has just finished offering Moses and Israel.<sup>107</sup> These are the "propositions" Yahweh ostensibly orders Moses to write down. But then the text records someone, Moses or Yahweh, actually writing down "the propositions of the covenant" on the tablets. If we take the text literally and stop before the apposition, we would suppose that Moses, having just been instructed to "write these propositions", wrote "the propositions of the covenant" on the tablets. But we know from other texts

<sup>104</sup> XXIV, 3-4.

<sup>105</sup> Rashi's first commentary is that the *Five Books* are a deed of Israel to the land of Canaan. Rashi's Commentary, In the Beginning Of, I, 1 ("In the beginning of").

<sup>106</sup> XXXIV, 27-28.

<sup>107</sup> XXXIV, 10-26.

that the second set of tablets have on them only the "ten propositions," and that Yahweh wrote them.<sup>108</sup> The text places "the ten propositions" in apposition to "the propositions of the covenant." It thus appears to be intentionally mixing Yahweh's instruction to Moses to write with Yahweh actually writing, and the content of what Yahweh instructed Moses to write with the content of what we know from other texts Yahweh wrote.

The significance of the ambiguity sharpens when we note that "the propositions of the covenant" that Yahweh ordered Moses to write in the last meeting on the mountain recalls the first reference to actual writing, the writing Moses records himself doing after the fourth meeting with Yahweh. In the very next reference after the one to Moses actually writing, a reference to reading, Moses calls the writing he records himself having written, "the book of the covenant" (R):

And he took the book of the covenant, and read in the ears of the people, and they said: All that Yahweh has said, we will do and we will hear.<sup>109</sup>

Moses makes it clear that Moses wrote the book of the covenant. But he does not record Yahweh commanding him to write it. He does record Yahweh commanding him to write the propositions of the second covenant, during the last meeting on top of the mountain, but leaves us confused as to whether he wrote the propositions directly after the command, and whether he wrote them on the tablets.

Moses' writing of the book of the covenant is similarly laced with ambiguity. Moses does not make it clear that Yahweh commanded Moses to write it. More importantly, Moses does not tell us exactly what Moses wrote. Rashi comments that "And Moses wrote" means to say Moses wrote *In the Beginning Of* and the portions of *Names* up to "the giving of doctrine."<sup>110</sup> He also maintains that the prior reference to "all Yahweh's propositions," put side-by-side with "all the rules," refers to the propositions Yahweh asked Moses to speak to the people during the first three meetings on top of the mountain.<sup>111</sup> These included preparatory instructions for speaking the ten propositions before Moses and the people. The people's fear upon hearing

<sup>108</sup> And Yahweh said to Moses: Make two tablets of stone like the first, and I will write on the tablets the propositions that were on the first tablets, which you broke. XXXIV, 1 (W6).

<sup>109</sup> XXIV, 7.

<sup>110</sup> From *In the Beginning Of* until the giving of the doctrine, and he wrote the commandments which were commanded at Marah.

Rashi's Commentary, Names, XXIV, 4 ("And Moses wrote").

<sup>111</sup> Rashi's Commentary, Names, XXIV, 3 ("All Yahweh's propositions").



Elohim's speech led to Moses' fourth meeting, on the slopes, where Moses received the rules. Rashi does not include the ten propositions in the book of the covenant, though Elohim did speak them to Moses and the people prior to the reference to Moses actually writing.<sup>112</sup> Nor does Rashi include the rules, though they too, at least according to the order in the text, have already been spoken to Moses prior to his writing the book of the covenant. "And Moses wrote all Yahweh's propositions," may or may not mean to exclude the rules from the writing.

Moses could be describing Yahweh ordering him to write down the rules (or Moses actually writing them) at only one other place in the text, the very place Yahweh orders Moses to "write these propositions," during the last meeting on the top of the mountain. After having implicitly rejected the writing of the rules in the book of the covenant, Rashi does not clearly tell us that Yahweh commanded Moses to write the rules during the last meeting. Rashi's only comment on "write these propositions" is revealing:

But you are not permitted to write down the oral doctrine.<sup>113</sup>

The oral doctrine (*mesirah*, handing over) is an oral tradition, tracing its authority to transmission from Moses, through Joshua, to generations of authoritative interpreters.<sup>114</sup> Rashi locates the textual source of the oral doctrine here, where Yahweh commands Moses to "write these propositions": *these* and not others, which also have been spoken during the eighty days at the top of Mt. Sinai. Rabbinic tradition uses the oral doctrine as a system of exegesis of Moses' rules. It also uses oral doctrine as a source of unwritten rules, of the same order as Moses' written rules, and as a source of canons of interpretation, both of written and unwritten rules.

Though the necessities of Rome's occupation forced the Rabbis to abrogate the command not to write down the oral doctrine, the spirit of the command remains an essential norm of the system of law in the *Five Books*. Without oral doctrine the written rules could not be put in play, could not be "changed." Rules such as "an eye for an eye,"<sup>115</sup> which the oral doctrine construes to mean "money compensa-

<sup>112</sup> I mean "prior" in the text. Rashi's chronology is undoubtedly consistent with his omission of the ten propositions.

<sup>113</sup> Rashi's Commentary, Numbers, XXXIV, 27 ("Write these propositions").

<sup>114</sup> The Principles of Jewish Law 53 (M. Elon ed. 1975). For an extraordinary discussion of the relationship between writing and the oral tradition, see J. Faur, *Golden Doves with Silver Dots: Semiotics and Textuality in Rabbinic Tradition* (1986). See also G. Vermes, *Scripture and Tradition in Judaism: Written and Oral Torah*, in *The Written Word: Literacy in Transition* 79-95 (G. Baumann ed. 1986).

<sup>115</sup> XXI, 24.

tion for an eye,"<sup>116</sup> could not be read: they could only be slavishly obeyed. The oral doctrine gives authority to future generations to put the written rules in play, to "change" them. The oral doctrine rescues the written rules from positivism.

The mystery of Moses' legal system is not that Moses did not write down certain of the rules (together with principles of exegesis and interpretation), which Yahweh had spoken to him either on the slopes or on top of Mt. Sinai, but that he did write down some of the rules spoken to him "near the fog,"<sup>117</sup> on the slopes of the mountain. The writing itself puts the writing in question. First, the rules Moses came to write were spoken to him on the slopes of the mountain. The oral doctrine is superior to these rules, since Yahweh spoke it to Moses on top of the mountain. Second, Yahweh spoke the rules Moses came to write in reaction to the fright of the people when they heard Elohim (as the text says) speaking the ten propositions:

And all the people see the loud noises and torches, and the voice of the horn, and the mountain smoking. And when the people feared, they moved, and stood in the distance. And they said to Moses: You speak with us, and we will hear, for if Elohim will speak with us, we will die.<sup>118</sup>

The rules—backed by frightful sanctions—are a reaction to fright. The people "see . . . the voice"; they do not hear it. The rules are rules for people whose reactions to the ten propositions are frightened reactions, who "see" the ten propositions as "loud noises and torches" rather than "hear" their intellectual content. Though rules are "further propositions" whose preferable sanction is reason, the people will treat them only as triggers for sanctions. One rules frightened people by sanctions, not by reason. The oral doctrine rules by reason. It subjects sanctions, such as "an eye for an eye," to reason.

Moses reduces the "frightening" rules to writing, because frightened people must see. They cannot hear. But he is very careful to show us, his readers, that his reduction of the frightening rules to writing does not have clear textual authority—Yahweh's authority, if you will. How could it? How could the name of God as collaboration sanction the fright of the people? How could the writing of rules calculated to frighten them further be collaborative writing in any sense?

Though Moses' dangerous writing may be necessary, it does not serve to complete creation. The written rules, like all engraved objects, treat creation as already completed by Elohim. They can be

<sup>116</sup> See Babylonian Talmud, Baba Kamma 83b.

<sup>117</sup> XX, 18.

<sup>118</sup> XX, 15-16.

rescued from engraving only by rewriting, only by correction and supplementation through oral doctrine. The oral doctrine is a doctrine of speech and hearing, not a doctrine of seeing, as are written rules. Without the oral doctrine, the people would bow to the written rules as they bowed to the golden calf, out of fright. The oral doctrine rescues the people from fright. It reads the written rules, and rewrites them. It erases the written rules. It stops people from regarding them as idols.

Rashi's anchor for the oral doctrine is not the only possible anchor.

First, Moses invites us to compare the structure of his references to writing with the structure of his meetings with Yahweh at Mt. Sinai. ("T" stands for a meeting at the top of the mountain; "S," for the meeting on the slopes; and "M," for the meeting in the Tent of Meeting):<sup>119</sup>

T1	Golden	T5
T2	Calf	T6
T3	Crisis	T7
S		M
T4		T8

The center of both structures is the crisis of idolatry, the golden calf.<sup>120</sup> Moses has eight (possibly six) meetings with Yahweh at the top of Mt. Sinai, just as *Names* has eight references to writing.<sup>121</sup> The meeting on the slopes, "near the fog" (S), in which Moses hears the rules he will write down and read to the people, mirrors the reference to reading (R). The meeting in the Tent of Meeting (M), in which Moses persuades Yahweh not to be absent (to be "present") on the journey to Canaan, mirrors the reference to erasure (E). Altogether Moses makes ten references to writing and its allied activities (reading and erasure), just as he recounts ten meetings (and hears ten propositions).

The structure of meetings draws attention to a symmetry between S-T4 and M-T8.<sup>122</sup> Thus, in S Yahweh tells Moses the rules. Between S and T4 Moses writes down the rules (without "authority"),

<sup>119</sup> See *supra* text accompanying notes 26-48.

<sup>120</sup> See *supra* text accompanying notes 60-61.

<sup>121</sup> Moses does not tell us the venue of two meetings, T6 and T7. Even so, my argument does not depend on assuming that T6 and T7 take place on top of the mountain. Moses' silence on the venue of T6 and T7 is significant for other reasons. In particular, Moses raises the issue of Yahweh's "presence" in two "placeless" meetings. Yahweh also tells Moses to tell the people to remove ornaments which they never put on and Yahweh knows they never put on.

<sup>122</sup> Amongst others, which I do not explore.

reads them to the people, and performs a covenant ceremony "of his own devising"<sup>123</sup> sprinkling the people with the blood of a sacrifice.

<sup>123</sup> When I say, "of his own devising," I mean nothing more than "without clear authority indicated in the text." Since one of Moses' doctrines is that Elohim absolutely rules all of creation, nothing can truly or strictly be "our own." But another of Moses' doctrines is that Elohim—the God of categorical, ruled and ruling attributes—is also Yahweh—the God of textual authority, the God of texts, the God of articulated (proper) names. See *supra* note 12. To look in Moses' text for clear authority, I would argue, is to regard God only as Elohim—God dictating the narrative to Moses as God dictates all of creation in the narrative. To say that Moses' text does not show clear authority for the covenant ceremony is to say that Moses, an articulated name, is endeavoring to collaborate with Yahweh, God as an articulated name. Moses' text must show an absence of clear textual authority—"elohim" authority—in order to establish collaboration with Yahweh. The absence of clear textual authority does not imply the absence of actual authority—the authority of deeds done collaboratively with Yahweh. On these matters, see M. Maimonides, *supra* note 12, pt. III, ch. 17, at 464-74.

Maimonides takes a contrary position in his *Mishnah with Commentary*, *Sanhedrin* Tenth Chapter, at 143-44 (Mossad Ha-Rav Kuk 1984-85):

And the eighth principle [of Maimonides' thirteen basic principles of Judaism] is the Torah from the skies. And that we believe that this entire Torah found in our hands today is the Torah that was given to Moses. And that it stems in its entirety from the Mouth of Might. That is to say that there reached [arrived to, touched] him, entirely from Yahweh, a reaching which we call speech [*dibbur*], by a borrowing [metaphor]. [In note 29, at 151, Kapach prefers a Hebrew translation of Maimonides' Arabic as "transfer" rather than "borrowing".] And none knows the quality of this reaching but he, peace be upon him, to whom the reaching came. And that he is in the status of a scribe before whom we read, and he writes down everything—her [the Torah's] dates, stories and commands—and is thus called a decree-maker [*m'h.okek* also means engraver, or legislator]. And there is no difference between "And the children of Ham and Kush and Egypt and Phut and Canaan," "And the name of his wife—Mehitabel, daughter of Matred," or, "I am Yahweh," and "Hear Israel, Yahweh is our Elohim, Yahweh is One." All is from the Mouth of Might, and all is Yahweh's Torah, perfectly whole, pure, sanctified, and true. And to them [the Rabbis] Menashe was not made a denier more than any other denier because he thought that within the Torah exist an inner core and an outer shell, and that these dates and accounts have no utility in them, and that Moses said them from his own knowledge, and this is the notion, "There is no Torah from the skies." They [the Rabbis] said that it comes with one who declares that the entire Torah is from the mouth of The Holy One Blessed Be He but for one verse that The Holy One Blessed Be He did not say, but that Moses said from his own mouth. And this is, "Because he has scorned the word of Yahweh." May Yahweh rise above what the deniers say. But each letter in her [the Torah] has in her wisdom and wonders to whoever understands Him, Yahweh. And the end of her [the Torah's] wisdom will not be reached, "Longer in measure than land and broader than the sea." And a human has nothing to do but pray, following in the footsteps of David, the messiah [the anointed] of the Elohim of Jacob, who prayed, "Open my eyes that I may see wonders from Your Torah." And so, the Torah's interpretive tradition also comes from the Mouth of Might. And that which we make today, the form of the Sukkah, and the Lulav, and the Shofar, and fringes and Phylacteries and the rest, that is the form itself that Yahweh said to Moses, and that Moses said to us. And he merely acted as a conduit of Yahweh's agency, a faithful agent of Yahweh in what he brought. And the speech [*dibbur*] in which the eighth principle is indicated is said in: "With this shall you know that Yahweh sent me; for I have not done them of my own mind."

In T4 Moses receives Elohim's tablets. Also, in M Moses persuades Yahweh to be "present"—to accompany the Israelites to Canaan, not to send an angel (a physical manifestation, according to the tradition) instead. Yahweh also orders Moses to carve a second set of tablets, on which He promises to write the propositions on the first set, which Moses broke. Between M and T8 Moses hews the second set of tablets. In T8 Yahweh makes a covenant with Israel, and writes the ten propositions ("because on the basis of these propositions I have made a covenant with you and with Israel") on the second set of tablets, apparently with Moses' collaboration.

The difference between S-T4 and M-T8 focusses on the two covenants and their link to writing. Moses' blood covenant and his writing and reading of the rules (S-T4) take place on the ground. Yahweh's covenant (M-T8) takes place on top of the mountain, and is "sealed" by Moses' and Yahweh's collaborative writing of the ten propositions on the tablets. Looking backward after the crisis of the golden calf, Moses' blood covenant, his writing and reading of rules with bloody sanctions, smacks of idolatry. It is an "inauthentic" version of the true covenant—collaborative writing and conversations with Yahweh. Not covenants of blood and written rules, but ten propositions and conversations with Yahweh about them escapes the snares of idolatry.

Moses writes the rules without indicating clear authority in the text where he records his writing. He tells us that writing them risked idolatry. It might have been better had he not written the rules, had they stayed oral. Then the people would not be tempted to bow to them as they are tempted to bow to idols.

Second, Moses suggests that he himself interpreted Yahweh's commands when he related them to the people, and that Yahweh Himself interpreted His own commands. Moses' interpretive suggestion requires expository patience. But Moses rewards patience.

In Moses' first ascent of Mt. Sinai,<sup>124</sup> Yahweh tells Moses to tell the people:

You have seen what I did to Egypt, and how I bore you on eagles' wings, and brought you to Me. And now, if you will diligently

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Id.

What I claim to be Moses' description of the authority of writing is, I believe, an accurate description of writing any of us does that we believe to be true. The writing is "our own," but we do not "properly" write it. The words flow as they must according to the logic of the text. We write, and we do not write. The text is written "through" our name. We must, as Derrida says in his paper for this colloquium, sign our name to take responsibility for the text. This is also Moses' theme.

<sup>124</sup> XIX, 3-6.

hear what I tell you, and keep My covenant, then you will be My own treasure of all the peoples, for all the earth is Mine. And you will be to Me a kingdom of priests, and a holy nation. These are the propositions which you shall speak to the children of Israel.<sup>125</sup>

Moses set "all these propositions" before the elders of the people, and the people answered: "All that Yahweh has spoken we will do."<sup>126</sup>

In the second ascent,<sup>127</sup> Moses reported the people's response to Yahweh, and Yahweh told Moses:

Go to the people and sanctify them today and tomorrow, and let them wash their clothes. And they will be ready on the third day, for on the third day Yahweh will come down before the eyes of the people on Mt. Sinai. And you shall set bounds to the people round about, saying: Beware of going onto the mountain or touching its edge. Whoever touches the mountain shall surely be put to death. No hand shall touch him, but his hand shall surely be stoned, or shot through. Whether beast or man, it will not live. When the ram's horn sounds long, they shall come up to the mountain.<sup>128</sup>

In executing Yahweh's command to get the people ready, Moses added one preparation to those Yahweh listed, which according to Moses' own account he could only have inferred by interpreting Yahweh's propositions:

And Moses went down from the mountain to the people. And he sanctified the people. And they washed their clothes. And he said to the people: Be ready against the third day. Do not come near a woman.<sup>129</sup>

The sanctification ritual Yahweh ordered Moses to perform and Moses reports himself performing is presumably the set of decrees (*h.ookah*)<sup>130</sup> of the red heifer, which he reports in the fourth book, *In the Wilderness*:

And Yahweh spoke to Moses and Aaron, saying: This is the set of decrees of the doctrine which Yahweh has commanded, saying: Speak to the children of Israel, that they take to you a faultless red heifer,<sup>[131]</sup> in which there is no blemish and on which there came no yoke. And you shall give her to Eleazar [Elohim helped] the priest, and she shall be brought outside the camp, and he shall

<sup>125</sup> XIX, 4-6.

<sup>126</sup> XIX, 8.

<sup>127</sup> XIX, 8-13.

<sup>128</sup> XIX, 10-13.

<sup>129</sup> XIX, 14-15.

<sup>130</sup> In modern Hebrew "*h.ookah*" means "constitution." I translate it as "set of decrees," since I do not believe constitutions were a known art-form in Moses' time, and "*h.ookah*" is clearly closely related to "*h.ok*"/"*h.ookim*".

<sup>131</sup> "Heifer:" "A young cow, that has not had a calf." 5 The Oxford English Dictionary, "heifer," at 195 (1970).

slaughter her before his face. And Eleazar the priest shall take blood from her with his finger and sprinkle her blood seven times in the face of the Tent of Meeting. And one shall burn the heifer in front of his eyes. Her skin, her flesh and her blood with her dung shall be burnt. And the priest shall take cedar-wood and hyssop and scarlet, and cast them into the burning of the heifer. Then the priest shall launder his clothes and wash his flesh in water, and afterward he will come into the camp, and the priest shall be unclean until the evening. And he that burns her shall wash his clothes in water, and wash his flesh in water, and shall be impure until the evening. And a man that is pure shall gather up the ashes of the heifer and place them outside the camp in a pure place. And it shall be for the congregation of the children of Israel for a keeping for a water of separation. It is a purification from sin. And there he that gathers the ashes of the heifer shall wash his clothes, and be unclean until the evening. And it shall be a decree forever to the children of Israel and to the proselyte that lives among them.<sup>132</sup>

Rashi comments that the set of decrees of the red heifer is the decree that Yahweh gave at the first revelation, prior to Mt. Sinai, in Marah.<sup>133</sup> Rashi's reasoning is undoubtedly that Yahweh gave the set of decrees of the red heifer in order to enable the Israelites to sanctify themselves at Mt. Sinai, as Yahweh ordered. The set of decrees of the red heifer requires laundering clothes, as Yahweh had ordered at Mt. Sinai, but nowhere does it mention staying clear of women. (The sacrifice, however, is female, and anyone who touches its product becomes unclean.) The evidence is persuasive that Moses added: "Do not come near a woman"<sup>134</sup>

<sup>132</sup> In the Wilderness, XIX, 1-10.

<sup>133</sup> Rashi comments:

At Marah He gave them a few sections of a doctrine that they will be engaged with them: Sabbath, red heifer and legal procedures (*dinim*).

Rashi's Commentary, Names, XV, 25 ("There He put for them").

The rule was the rule of the Sabbath. The decree was the set of decrees (*hookeh*) of the red heifer.

<sup>134</sup> Rashi is silent on the question whether "Do not come near a woman" constitutes Moses' interpretation. He does, however, comment that the immediately preceding words in Moses' text—"Be ready against the third day"—may be what we may interpret to be either error or interpretation:

At the end of three days, which is the fourth day, for Moses added one day on his own accord, according to Rabbi Jose. However, according to he who says that on the sixth day of the month the ten propositions were given, Moses did not add anything . . .

Rashi's Commentary, Names, XIX, 15 ("Be ready against the third day"). Rashi finds textual support for "Do not come near a woman" in Moses' second meeting with Yahweh, when Yahweh says, "And be ready." Rashi's Commentary, Names, XIX, 11 ("And be ready"). It is interesting to note that Rashi's textual support for the proposition that Moses added a day is

Moses records Moses supplementing the commands Yahweh gave Moses in the second ascent. Moses' own text gives evidence that Moses was prepared to interpret the words Yahweh spoke to him, that he was not content, at least as far as reporting Yahweh's messages to the people, to be a "stenographer." Since Moses gives evidence in his own text that he interpreted Yahweh's commands, he puts us on warning that he may have engaged in other interpretations. Unlike the people, however, we who are reading Moses' text know the "inside story" of his conversations with Yahweh. Are we then privileged to know *all* the instances of Moses' interpretation, carefully comparing the words of Yahweh with Moses' transmissions? But Moses does not make it clear that he writes for us all his conversations, and does not assure us that he is not engaging in written interpretation in the text, as well as oral interpretation before the people. The text thus puts in question here any superiority we might have thought our privileged reading of the text had given us over the Israelites receiving Moses' oral reports. Our relationship to Moses, as readers to author of a text, is not less dependent or uncertain than the relationship of the Israelites to Moses at Mt. Sinai. And we know from the rebellions against Moses' authority and God's authority to come in the fourth book, *In the Wilderness*,<sup>135</sup> that the relationship of

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in the words immediately following "And be ready," when Yahweh says, "against the third day." In his comment, Rashi refers to XXIV, 4, which is the place where Moses engaged in writing without indicating in his text clear textual authority. May we read a tactful concession into Rashi's reference?

Professor Bleich agrees that the textual evidence for Moses' interpretation is clear, but tells me that the tradition does not regard "Do not come near a woman" as the correct example. He follows Rashi. Professor Bleich argues that Moses would have understood "sanctify them" as including the prohibition against touching a woman, since the portions of *He Called* devoted to ritual purity, XI-XVII, make this prohibition clear.

Apart from doubts I have about Moses' knowledge of the revelations in *He Called* at this moment in the narrative, my claim that Moses is interpreting when he adds "Do not come near a woman" does not depend on Moses being ignorant of all the revelations in *He Called*. Even under Professor Bleich's interpretation, it is undeniable that Moses "put together" Yahweh's command to sanctify with certain revelations in *He Called*. Moses' "putting together" constitutes interpretive activity, albeit less extensive than the activity I attribute to Moses at this point.

In any case, I do not see what in the tradition depends on choosing Moses adding a day over "Do not come near a woman" as the evidence that Moses is interpreting. Perhaps what is at stake is the nature of interpretation.

<sup>135</sup> In the Wilderness, XI (rebellion of lusts); In the Wilderness, XII, 1-15 (Miriam and Aaron rebel against Moses for marrying a Cushite woman); In the Wilderness, XIII, 1 - XIV, 39 (the people refuse to go immediately to Canaan); In the Wilderness, XVI, 1-35 (Korach's rebellion against Moses); In the Wilderness, XX, 1-13 (Moses struck the rock twice to produce water at Merivah [quarrel]); In the Wilderness, XXI, 4-9 (the people spoke against Elohim and Moses); In the Wilderness, XXV, XXXI (sexual relations with Moabite women; Baal and Pinchas' intervention; sexual relations of an Israelite man with a Midianite woman; war against the Midianites).



the Israelites to Moses, and through Moses to Yahweh, is dependent, rebellious, and uncertain.

The last rebellion in *In the Wilderness* concerns the sexual relations of a Midianite woman with an Israelite man during the punishment of the Israelites for Israelite men having consorted with Moabite women. Yahweh commanded Moses to "harass the Midianites and smite them"<sup>136</sup> and, to "avenge the vengeance of the children of Israel on the Midianites."<sup>137</sup> Moses' troops, acting in the usual manner, did not at first kill the Midianite women and male children. But Moses commanded them to kill every male child and every woman who had had sexual relations with any man, and to purify themselves in a manner reminiscent of the set of decrees of the red heifer.<sup>138</sup> Again, Yahweh had not instructed Moses to kill the women and male children, an act of interpretation echoing what I claim to be his first interpretation of Yahweh's command during the second ascent of Mt. Sinai. The last rebellion in *In the Wilderness*—the sexual relations of an Israelite man with a Midianite woman—recalls the first rebellion in *In the Wilderness*, of Miriam and Aaron against Moses for having taken a Cushite woman as his second wife. Moses' first wife was a Midianite, Tsipporah. Also, the last rebellion recalls Moses' "interpretation" of Yahweh's command during his second ascent of Mt. Sinai: "Do not come near a woman."

"Interpretation" is necessary. It is also tempting. It is dangerous enough when it is necessary. When interpretation is done because it is tempting, it masks rebellion.<sup>139</sup> Moses ties the act of interpretation to the purification ritual of the red heifer—the sacrifice of a female animal that has never born offspring, touching whose product

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*In the Wilderness* contains seven rebellions. An interesting number.

<sup>136</sup> In the Wilderness, XXV, 17.

<sup>137</sup> In the Wilderness, XXXI, 2.

<sup>138</sup> In the Wilderness, XXXI, 17-20.

<sup>139</sup> Korach rebels against Moses' and Aaron's claim to superior interpretive authority: "You take too much upon you, seeing the whole congregation are every one of them holy and Yahweh is in them." In the Wilderness, XVI, 3. Korach's is the fate of a "groundless" interpreter:

And Moses said: Hereby you shall know that Yahweh has sent me to do all these works, for I have not done them of my own heart. If these men [Korach's party] die the common death of all men, and the visitation of all men be visited over them, Yahweh has not sent me. But if Yahweh create a creation, and the ground open her mouth, and swallow them up with all unto them, and they go down alive into the pit, then you shall know that these men have despised Yahweh. And when he finished talking all these propositions, the ground did cleave asunder that was under them. And the earth opened her mouth, and swallowed them up, and their households and all the men unto Korach and all their goods.

In the Wilderness, XVI, 28-32. Not all battles over interpretive authority have been resolved so definitively.

creates impurity. He ties the content of his interpretations to temptation and impurity—the necessity and danger, as he regards it, of women.

Interpretation, Moses tells us, is a woman.

Other moments in the text alert us that Moses' Midianite marriage was dangerous. Moses records that Yahweh tried to kill Moses directly after their first meeting in Midian, as Moses was on his way back to Egypt with Tsipporah and their uncircumcised son, Gershon:

And on the way, at the inn, Yahweh met him and sought to kill him. Then Tsipporah took a flint, and cut off the foreskin of her son, and flung it at his feet, and said: For you are a bridegroom of blood to me. So He let him alone. Then she said: You are a bridegroom of blood in regard of the circumcision.<sup>140</sup>

Gershon had not been circumcised, presumably because Moses was married to a Midianite. Yahweh was prepared to kill Moses, even after Yahweh had chosen him in the meeting at the burning bush. Moses began his collaboration with Yahweh. But he had been unable to collaborate with Tsipporah. She saves him, angrily. She saves him from the anger of his future collaborator.

The danger posed by Midianite women looms over the text. Moses' interpretations loom over it as well.

As we have come to expect in Moses' collaboration with Yahweh, Yahweh echoes Moses' supplement with a supplement of His own during their third meeting and conversation:

And Yahweh said to Moses: Go down, charge the people, so that they will not destroy their position to gaze at Yahweh, and many of them perish. And the priests that come near to Yahweh will sanctify themselves, lest Yahweh break through upon them. And Moses said to Yahweh: The people cannot come up to Mt. Sinai, for you have charged us, saying: Set bounds to the mountain, and sanctify it. And Yahweh said to him: Go, get down, and you shall come up, you and Aaron with you, and the priests. And the people shall not destroy through to come up to Yahweh, lest He break through upon them. So Moses went down to the people, and told them.<sup>141</sup>

Moses complains that Yahweh is repeating the command to charge the people. In fact, Moses' complaint is not well founded, for two reasons. The original charge concerned "touching" rather than "gazing." One might say that Yahweh Himself is anticipating a possible "misinterpretation" of His first charge, that people will "destroy

<sup>140</sup> IV, 24-26.

<sup>141</sup> XIX, 21-25.

through to gaze," believing they are not physically "touching" the mountain. Yahweh is "interpreting" His own charge. Also, in the course of repeating His charge Yahweh adds to it an "implied" license for the priests to come closer than the people. Yahweh may be "adding" the license, but He may again be "interpreting" a possible "mis-interpretation" of His original charge, that priests must obey the same restrictions as the people. Either way, Yahweh is changing the words of His original charge in a manner similar to Moses. Both are interpreting.

Yahweh shows irritation with Moses for not permitting Him the same interpretive "license" that Moses permitted himself. Moses must learn the rules of their collaboration. If man is made in Elohim's image, and man must interpret Elohim's commands in order to collaborate with Yahweh, then Yahweh too must interpret His own—Elohim's—commands. The text ratifies the act of interpretation, by showing Yahweh reflect the act of interpretation. Yahweh is Elohim by reflection—the image of an image.<sup>142</sup>

Moses places the text of Yahweh's interpretation of His own command in apposition with the text of Moses' interpretation. The position of the priests, we expect, will mirror the position of women. They too are necessary and dangerous.

What is a priest? Moses tells us:

And all the people see the loud noises and torches, and the voice of the horn, and the mountain smoking. And when the people feared, they moved, and stood in the distance. And they said to Moses: You speak with us, and we will hear. For if Elohim will speak with us, we will die. And Moses said to the people: Do not fear, for in order to try you Elohim has come, and in order that His fear will be on your faces, so that you will not sin. And the people stood in the distance, but Moses drew near to the fog where the

<sup>142</sup> Like Eve (*Khavah*). The text places Yahweh/Elohim in the same position as Eve—the image of an image. In *In the Beginning Of*, Adam gave Eve two names—*Khavah* (mother of life) (III, 20) and *Eeshah* (woman) (II, 24). God also has two names, Yahweh and Elohim.

The text links the Elohim name of God with the equal creation of man and woman, and the Yahweh name of God with the creation of *Khavah* from *Adam* (human) as the image of an image. In the first chapter of *In the Beginning Of*, Elohim creates both man and woman as equals. In the second chapter, Yahweh enters the text, and Yahweh/Elohim (a double) creates *Khavah/Eeshah* (a double) from the side of *Adam* (human), the image of an image. Yahweh/Elohim and *Khavah/Eeshah* are in equivalent relationships with *Adam* (human). They both have two names. They both collaborate with *Adam*. *Adam* (meaning "human") has no name.

Unlike the Christian tradition, in which God manifests "Himself" definitively as a male human, the Jewish tradition does not take a position on the gender of the Deity. Though it would be utterly perverse in traditional terms to press the point, Moses' text, inasmuch as it calls our attention to any notion of gender in speaking of the Deity, associates the articulated, proper name of God—God as collaborator, Yahweh—with *Khavah*, a woman.

Elohim was.<sup>143</sup>

"Seeing" the voice of Elohim frightens the people. They want Elohim to speak to Moses, and Moses to speak to the people. They want Moses to mediate between them and Elohim. They do not want to collaborate with Yahweh, without mediators. A priest is one who mediates between the people and Elohim.

Yahweh's response is instructive:

And Yahweh said to Moses: Thus you shall say to the children of Israel: You have seen that I have talked with you from the skies. You shall not make with Me gods of silver, and gods of gold you shall not make for yourselves. You shall make to Me an altar of earth and sacrifice on it your burnt offerings and your peace offerings, your sheep and your cattle. In every place where I will mention My name I will come to you and bless you. And if you shall make Me an altar of stones, you shall not build it of hewn stones. For if you lift your sword on it, you have profaned it. Neither shall you go up by steps to My altar, that your genitals not be uncovered on it.<sup>144</sup>

Yahweh's first response to the people's request that Moses mediate is to repeat the warning, already stated in the ten propositions, against making idols. Yahweh then lists two likely substitutes for idols: beautifully (violently) carved altars, and uncovered genitals. He then tells Moses the rules.<sup>145</sup>

The rules close with a further warning against making and bowing to idols.<sup>146</sup> Yahweh follows the rules immediately with a call:

And He said to Moses: Come up to Yahweh, you and Aaron, Nadav and Avihu, and seventy of the elders of Israel, and bow in the distance. And Moses alone came near to Yahweh. And they did not come near. And the people did not come up with him.<sup>147</sup>

Yahweh establishes the priority of the priests—Aaron, Nadav and Avihu—over the people.

The very next passage records Moses engaging in his writing without clear textual authority. The full passage is also instructive (W2 and R):

And Moses wrote all Yahweh's propositions, and got up early in the morning, and built an altar beneath the mountain, and twelve monuments for the twelve tribes of Israel. And he sent the young lads of the children of Israel, who offered burnt offerings, and they

<sup>143</sup> XX, 15-18.

<sup>144</sup> XX, 19-23.

<sup>145</sup> XXIII.

<sup>146</sup> XXIII, 32-33.

<sup>147</sup> XXIV, 1-2.

sacrificed peace offerings of oxen to Yahweh. And Moses took half the blood, and put it in basins. And he threw half the blood against the altar. And he took the book of the covenant, and read it in the ears of the people. And they said: All that Yahweh has said we will do and hear. And Moses took the blood, and threw it on the people. And he said: Here is the blood of the covenant, which Yahweh has made with you concerning all these propositions. Then Moses and Aaron, Nadav and Avihu and seventy of the elders of Israel went up. And they saw the Elohim of Israel. And under His feet there was the like of a brickwork of sapphire, the like of heaven for purity. And He did not lay His hand on the nobles of the children of Israel. And they saw the Elohim, and ate and drank.<sup>148</sup>

Then Moses, together with young Joshua (not the priests or elders), rose up and Moses went alone to the top of the mountain for his first forty-day sojourn, where he reports learning instructions about the cult.<sup>149</sup>

The passage records Moses carrying out Yahweh's instructions regarding altars and sacrifices, with three characteristic and fateful additions. Moses retains the blood of the sacrifices and sprinkles it on the people in a covenant ceremony of his own devising. He also adds writing "all Yahweh's propositions" and reading them to the people. He calculates that the sprinkling of blood will remind us of one element of the set of decrees of the red heifer—an inappropriate, partial repetition of the purification ceremony Yahweh had reserved for the preparation of the people.<sup>150</sup>

This covenant ceremony—Moses' effort to collaborate with Yahweh—will not stick. The people, aided and abetted by Aaron, will turn from Moses' ceremony to making the golden calf. The reason they cite for turning to idols is Moses' delay. He is "delayed" for forty days on top of the mountain receiving instructions about the priestly cult and Elohim's tablets. He will smash the tablets, unerring (I am arguing) in his instinct that the people will bow to them as idols. Will they also bow to the mediators—Moses and Aaron? If they turn to Moses and Aaron because they are frightened, will they collaborate with Yahweh? Will those to whom they turn as mediators—Moses, Aaron, and Aaron's sons—betray the trust the people place in them?<sup>151</sup>

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<sup>148</sup> XXIV, 4-11.

<sup>149</sup> XXIV, 13.

<sup>150</sup> In the Wilderness, XIX, 4.

<sup>151</sup> Nadav and Avihu, Aaron's sons, clearly do betray the trust. In the only narrative "event" in *He Called*, Nadav and Avihu,

offered a foreign fire in the face of Yahweh, which He had not commanded them.

The balance of the text of the *Five Books* circles about these questions with an extraordinary variety of hints and further questions. I can touch only one or two.

Moses leaves no doubt about the uniqueness of his own abilities. When Miriam and Aaron rebel against Moses for marrying a Cushite woman, Moses writes:

And Yahweh spoke suddenly to Moses and Aaron and Miriam: Come out the three of you to the Tent of Meeting. And the three came out. And Yahweh came down in a pillar of cloud, and stood at the door of the tent, and called Aaron and Miriam, and they both came forth. And He said: Please listen to My propositions: If there will be a prophet among you, in a vision I will make Myself known to him. In a dream I speak to him. My servant Moses is not so. He is trusted in all My house. I speak with him mouth to mouth, even with sight, and not in riddles. And he can look at the image of Yahweh. And why were you not afraid to speak against

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And there came forth fire before Yahweh and annihilated them, and they died before Yahweh.

He Called, X, 1-2. Note the connection with Yahweh's threatened "annihilation" of the Israelites who made the golden calf, XXXII, 10. See supra notes 71-83 and accompanying text.

*Meshekh-Khokhmah*; Meir, Simkhah ha-Kohen, Yerushalaim, Even-Yisra'el (1980), an anthology of interpretations of the *Five Books*, contains the following comment:

And Yahweh was angry with me for what you have spoken. . . since I will die in this land and I shall not pass the Jordan. Propositions, IV, 21-22.

What is the purpose of this verse here, at this point in a chapter which deals with a warning against idolatry, both in the first and latter verses?

However, it is possible to say that the rationale for Moses' death in the desert is to prevent the Israelites from making him a god later on. As long as the generation which knew Moses from his childhood is still alive and sometimes may have had claims and grudges against him, there was no place for such fear. But the new generation which will enter Israel and will hear of all the signs and exemplars which Moses our Rabbi did, for it is possible that they may think of placing the shade of divinity upon him. For that purpose, Moses our Rabbi died in the desert together with that generation.

Therefore, when Moses our Rabbi warns Israel from idolatry, he is saying: "And Yahweh was angry with me for what you have spoken." It is your eyes that see that the Name-Blessed decreed death in the desert only because of you, so that you will not mistake me and make me too holy. From this it is easy for you to understand how much the Name-Blessed is fearful of your idolatry. And so, "watch yourself not to forget . . . and you have made yourself a statue [idol].

"Watch yourself . . . and you have made yourself a statue, a picture of all that Yahweh commanded you." Propositions, XXIII, 23.

And so the writing should have said: "that Yahweh has not commanded you?" However, "statue and picture" means to say: that which makes an image or a copy of a living object, so that the statue in itself is by no means original, but it is an imitation and a mirror of something else.

That should have been the interpretation of the writing: You shall not make "a statue and a picture" from the commands that Yahweh commanded you, but you shall follow the original command as it is, and not an imitation of that command . . . (Ad-Mo-Re HH'K from Kutzahk Z-tz'l).

My servant, against Moses?<sup>152</sup>

Moses retains his super-prophetic ability to speak directly with Yahweh throughout the *Five Books*. No other person has it:

And Yahweh came down in a cloud, and He talked to him and shaded the spirit [wind, breath] on him and on the seventy men, the elders. And then, when the spirit rested on them and they prophesied and did so no more. And two men stayed in the camp. The name of one was Eldad [Elohim's breast] and the name of the other is Maidad [breast's water]. And the spirit rested on them and they were in the scriptures [*ktubim*, writings]. And they did not go out to the tent, and they prophesied in the camp. And the lad ran and told Moses. And he said, Eldad and Maidad are prophesying in the camp. And there responded Joshua-bin-Nun, the servant of Moses and one of his lads. And he said: My sire Moses, jail them. And Moses said to him: Are you jealous for me? If it was only possible that all of Yahweh's people were prophets, for whom Yahweh would give his spirit on them.<sup>153</sup>

Others can be prophets, but they will not be able to speak face to face with Yahweh, as Moses can. Moses' super-prophetic abilities have an important consequence. If the people have questions about the rules, Moses can ask Yahweh to answer the questions.<sup>154</sup> Others cannot. After Moses dies, the people must answer their legal questions on their own, without Moses' super-prophetic mediation.

When Moses renegotiates the covenant, after the failure of the covenant ceremony "of his own devising," Yahweh says that the condition of his remaining "inside" the people is that no human will ever see His face after Moses.<sup>155</sup> Yahweh will remain "inside" people. They talk with Him by talking to themselves. They will not talk with Yahweh face to face, as did Moses.<sup>156</sup> They will collaborate with Yahweh by collaborating with themselves, and with each other.

The second covenant, unlike the first, is not a covenant initiated by Moses with the people. Yahweh simply calls His "proper" name, twice, and promises works, deeds, in exchange for deeds of the people.<sup>157</sup> The first covenant was a covenant of blood. The second, a covenant of deeds, self-witnessing acts, not words or blood. Moses simply reports the words of the second covenant to the people. He

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<sup>152</sup> In the Wilderness, XII, 4-8.

<sup>153</sup> In the Wilderness, XI, 25-29.

<sup>154</sup> In the Wilderness, IX, 6-13.

<sup>155</sup> XXXIII, 3, 20.

<sup>156</sup> XXXIII, 11.

<sup>157</sup> XXXIV, 6, 10-26.

does not ask them to say anything in response, just do and hear.<sup>158</sup>

#### OTHER JURISPRUDENCES

Moses' is not the only jurisprudence to require three writings. Common law and the jurisprudence of right do as well. Moses' is a jurisprudence of duty. These three—Moses' law, common law and the jurisprudence of right—make up a family of jurisprudences that are dynamic.<sup>159</sup> The universe of norms in a dynamic jurisprudence is never static. Legal persons must change the universe of norms in a dynamic jurisprudence in order to follow a single one of them. A dynamic jurisprudence requires persons to make law in order to fulfill the fundamental obligations of legality.

The dynamic jurisprudences treat law as an expression of the personality rather than an instrument of order. They are dynamic because the personality is dynamic. The account of personality in the three dynamic jurisprudences differs. In Moses' law, the jurisprudence of duty, the personality strives towards a communally shared image of perfection. In the jurisprudence of right the personality strives towards liberation, defined as recognition by other, similarly striving personalities. In common law, the personality attempts to suppress uncertainty of norms through concerted reciprocal action. The two non-dynamic jurisprudences—positivism and naturalism—treat law as an instrument of order. The static jurisprudences suppress personality, in any form, in the interests of order. They treat personality as anarchic. They acknowledge fewer than three writings.

Positivism insists that law achieves order only by force, and only by confining the exercise of force to a central bureaucratic apparatus. The "author" of law in a positivist system makes law in two steps. First, the author makes a procedure for making law. The procedure "marks" or "franks" certain norms as law. The procedure marks—makes—law, such as enacting a statute according to the procedures of statutory enactment or rendering a judicial decision according to the norms of rendering decisions. Persons do not make law directly, only by working the procedures. Unmarked norms are "customs."<sup>160</sup> The

<sup>158</sup> XXXIV, 32. "Do" first, and "hear" after. A nice description of monitoring action according to conscience.

<sup>159</sup> For a more detailed exposition of dynamic jurisprudence, in the context of a jurisprudence of right, see Jacobson, *Hegel's Legal Plenum*, 10 *Cardozo L. Rev.* 877 (1989). For the connection between dynamic jurisprudence and the revelatory tradition, see Jacobson, *Auto-poietic Law: The New Science of Niklas Luhmann*, 87 *Mich. L. Rev.* 1647, 1685-87 (1989).

<sup>160</sup> Some positivists, led by Hobbes, reject the legal status of customs. See T. Hobbes, *Leviathan*, ch. 26, at 204-06 (reprinted from the edition of 1651, 1909). To give legal status to customs, to unmarked norms, is to reject positivism: customary law has no authoritative mech-



first "writing" is the authoritative enactment of the procedure. The author of the first writing is either a single person backed by charismatic force, or a group of persons agreeing to a procedure and backing it by collective physical force or by tradition or a divine author donating a procedure and backing it by force in the way of the world. The second writing is the marking or franking of certain norms as law according to the procedure. Positivism treats the application of norms to cases as uninteresting, unproblematic—a private matter. True law in positivism is the product of two writings and two writings only.<sup>161</sup>

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anism for marking. See, e.g., Montesquieu, *The Spirit of the Laws* 104 (T. Nugent trans. 1949) (loss of written codes, which imitated the Roman codes, led to the re-establishment of customary law during the Dark Ages).

Hobbes calls unwritten law "natural law," not custom. See T. Hobbes, *supra*, at 205-06. Natural law describes the legal state of nature—the way of the world in the absence of civil law (norms marked as law by a sovereign). The way of the world includes the laws of force, together with the drives and talents of persons. The talents include the capacity to discover laws of natural reason. Customary law, by contrast, includes attitudes and patterns of action that cannot be justified or explained by universal reason. Custom becomes law only when it is marked as such by a sovereign.

One could—and Montesquieu does—have a very different account of custom, in which the attitudes and patterns of action can be justified or explained by reasoning creatures in the exact situation of creatures with the attitudes or patterns constituting the custom. The reason justifying or explaining such attitudes and patterns is not universal, Spinozist reason, as it is for Hobbes, but the empathetic reason employed by Montesquieu in the doctrine of spirit (*esprit*). Custom becomes spoken law that need not be written; natural law, the unspoken law that need not be written.

<sup>161</sup> H.L.A. Hart addresses the relevance of writing to law in H. Hart, *The Concept of Law* 92 (1961):

The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition.' This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. No doubt as a matter of history this step from the pre-legal to the legal may be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e., as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.

Id.

Hart's insight, limited by his narrow, pre-Derridean understanding of "writing," can have pernicious intellectual effects in the wrong hands. For an example, see M. Gagarin, *Early Greek Law* 2-17, 51-97, 121-141 (1986), one of the few texts to discuss the significance of reducing law to writing. Gagarin is most misled in his brief comments, heavily influenced by Hart, on the legal quality of Moses' code:

Naturalism asserts that law achieves order naturally, according to norms "written" or "engraved" in nature. Some forms of naturalism suppress the fact that persons "read" the "writing," both when they act and when they apply law to cases. Once again, persons do not make law, and true law is the product of one or two writings.

The static jurisprudences assert that a person cannot have a legal right unless another person simultaneously has a mirror-image legal duty, and vice versa. Rights must always be correlated with duties, and duties with rights. The dynamic jurisprudences agree that rights can never be correlated with duties. They break the correlation of rights with duties. They are dynamic because they break the correlation.

The jurisprudence of duty—of which Moses' law is the supreme example—breaks the correlation of rights with duties by abolishing right as an operative category in the jurisprudence. Persons have duties, not rights. A complainant goes to court, not because she is enforcing a right to compel another person to fulfill her mirror-image duty, but because she has a duty to report the other person's failure to the court. The duty to report is the duty of every person in the community. Persons in this jurisprudence are propelled to legal action by a drive to transform their personality in the direction of an image of perfection. In Moses' jurisprudence Yahweh/Elohim offers the image. Other jurisprudences of duty have other images.

The jurisprudence of right—of which Hobbes' *Leviathan*<sup>162</sup> and Hegel's *Philosophy of Right*<sup>163</sup> are examples—breaks the correlation by suppressing or de-emphasizing the role of duty. Persons want rights, but they do not want other persons to reflect the rights as duties. They want other persons to recognize the rights, not to obey duties. They are willing to engage in contractual exchanges of recognition in order to get what they want, which is recognition. Persons have duties only when they fail to provide recognition.<sup>164</sup>

Common law is the dynamic jurisprudence that asserts that law is just the application of law—the doctrine of precedent. Making or knowing a legal norm requires three applications. The first is the application of the norm in a prior case, a precedent. The second is the

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The various Hebrew codes of law preserved in the Old Testament are different [than the early Greek codes]. They cover many different areas of human behavior, and some of the rules can scarcely be considered legal.

Id. at 133 n.37.

<sup>162</sup> See T. Hobbes, *supra* note 160.

<sup>163</sup> G. Hegel, *Hegel's Philosophy of Right* (T. Knox trans. 1967).

<sup>164</sup> See Rosenfeld, *Hegel and the Dialectics of Contract*, 10 Cardozo L. Rev. 1199 (1989).

application of the norm in the case at hand, using the precedent. The third is application of the norm in the case at hand to a future case.

Persons in common law learn law first by reading prior applications. But they cannot know law just by reading prior cases. The norms generated by the prior cases must be applied in their case before they can know the norm, since the norm is just its application. Persons learn more about the norm as they plan action and act in light of their reading of the prior cases. The norm itself changes as persons act. It is general when they start. It becomes specific and calculable as they continue. Only once they "finish" the actions constituting their case does the norm "exist" as a full judgment on the propriety of their actions. One knows the norm by making it, in action. All action in common law (for that matter, in all dynamic jurisprudence) is legal action. All persons are constantly applying law. No moment in their lives is legally indifferent. Law drenches life and fills the universe. (In static jurisprudence large parts of the universe are legally indifferent, and what persons do in the gaps is their own business. Nothing in dynamic jurisprudence is the person's "own" business.) But completing action in a case does not finish making or knowing the common law norm. In order to know the norm thoroughly, persons must await a further application. The present case yields a complete norm only once it serves as a precedent for further action, a future application.

Common law breaks the correlation of rights with duties, but eliminates or suppresses neither right nor duty. It recognizes that rights and duties are correlated, but that the correlations themselves are dynamic, constantly changing as persons act, and as further applications revise norms generated in prior applications.<sup>165</sup>

The dynamic jurisprudences agree that persons make law, and that they cannot make it in one or two writings. Persons make law in three writings. The third writing makes the jurisprudence dynamic.

The dynamic jurisprudences always allocate one writing each to a past, a present, and a future. The static jurisprudences allocate writings only to a past and a present. There is no future, hence no dynamic driving the jurisprudence.

Moses' law allocates Elohim's writing to a past, Moses' writing

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<sup>165</sup> I shall leave unexplored the connections between common law and constitutionalism, in both its English and American versions. Suffice it to say that common law probably requires a background political doctrine of constitutionalism. On the connections between common law and English culture, see Goodrich, *Rhetoric, Grammatology and the Hidden Injuries of Law*, 18 *Economy & Society* 167 (No. 2, 1989), reprinted in P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* 111-148 (1990).

to the narrative present, and Yahweh's writing to a collaborative future. Common law allocates precedent to the past, application to the present, and further application to the future. The jurisprudence of right allocates the state of nature to the past, the contract leading out of the state of nature to the present, and law application to the future.

The dynamic jurisprudences differ only with respect to the writing—the past, present, or future—that drives persons in the jurisprudence, making it dynamic.

Collaboration with Yahweh—the writing of the future—drives persons in the jurisprudence of duty. Persons act in order to collaborate with Yahweh. They rewrite a model of perfection in an incessant struggle toward future perfection. The present is a flight towards the past. The past supplies the judgment of perfection. The future is a prospect that the present will attain past perfection.

The legal state of nature—the writing of the past—drives persons in the jurisprudence of right. They act—they struggle to get mutual recognition of rights—in order to flee the state of nature. The present is flight from a threatening past, from the state of non-recognition. The future guarantees that the present will successfully distinguish itself from the terrors of non-recognition.

Acting according to precedent with an awareness that actions create further precedents—the writing of the present—drives persons in common law. Persons act in order to achieve reciprocal certainty according to the doctrine of precedent. They seek certainty of norms, in the present. Past applications and future applications fold into action. Action makes norms by remaking past applications, and by offering further applications for remaking in the future.<sup>166</sup>

The writing driving each dynamic jurisprudence is the source of law in the jurisprudence. The originating state of each dynamic jurisprudence supplies energy propelling persons into action (necessarily always legal action, no action being legally indifferent). In the jurisprudence of duty the originating state is the future—collaboration with Yahweh. In the jurisprudence of right the originating state is the past—the state of nature. In common law the originating state is the

<sup>166</sup> Our founding text on writing in American jurisprudence is John Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Marshall's insistence that written constitutions require judicial review of legislation for conformity to the constitution is a corollary of the common law position on writing. See also *Goldberg v. Kelly*, 397 U.S. 254, 272-74 (1969) (Black, J., dissenting). For commentary on Marshall's position, see Ferguson, *We Do Ordain and Establish: The Constitution as Literary Text*, 29 Wm. & Mary L. Rev. 1 (1987); Grey, *A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation*, 19 Ariz. St. L.J. 587 (1987); Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984). See also Levinson, *Writing and its Discontents*, 3 Tikkun 36 (1988). Cf. *supra* note 165.

present—action according to precedent with an awareness that action creates precedents.

The static jurisprudences, by contrast, recognize only a past and a present. They propose no originating state. The writing of the past serves only to establish a foundation for the writing of the present. The writing of the present neither flees from nor seeks the writing of the past. Neither present nor past propels the person into action.

The static jurisprudences claim that persons can know law thoroughly at every moment. Law is always fully present. It never changes its relation to an originating state, in either past or future. Unlike common law, the static jurisprudences do not treat the present as an originating state, perpetually unfolding law as persons apply and create precedents in action. Law is fixed. It is fixed forever, even in positivism, which fixes law forever until it marks another norm as law. The marks of positivism, the maxims of the legal state of nature, refer only to the present. Persons know them completely in the present. Every legal person is conscious at all times of every legal norm. There is no "legal unconscious."

The common experience of persons is to the contrary. Even if positivism and naturalism could fulfill the promise that legal norms be fully present—fully presented by marks and maxims—the bulk of norms must be thin enough to guaranty that legal persons could know all of them at a single moment. That is why positivists, at least, often regard the physical inscription of law as crucial: inscription of law expands the effective memory of persons. When law-makers reduce law to writing, the bulk of norms with which persons can be charged enlarges, since persons have "access" to the writing, a legal "preconscious."<sup>167</sup> Naturalism, by contrast, simply asserts the "preconscious" accessibility of all norms.

Dynamic jurisprudence asserts that legal norms may be unconscious. Unlike static jurisprudence, it does not require that norms be present to consciousness or accessible to consciousness (precon-

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<sup>167</sup> Inasmuch as positivist law is inscribed law, positivism assumes complete, cost-free access by ordinary legal persons to the written legal corpus. Positivism suggests two ways to assure access: (1) a simple, spartan code "put up in the market-place" in plain view of all citizens, or (2) a complex body of laws mastered by a coterie of legal specialists whom ordinary citizens hire upon need. The first either requires repression of variety and eccentric activity, or leaves most activities legally unregulated. The second makes two assumptions: (1) that citizens will know when they need to employ the services of a legal specialist prior to undertaking an activity, and (2) that they will have enough money to engage the services of the specialist once they know the need for one. If either assumption fails, then citizens will not have the adequate access to the services of legal specialists that written law requires. Failure of the first assumption is a failure of public legal education. Failure of the second is an economic failure respecting the distribution of legal services.

scious). Dynamic jurisprudence allows for normative material that is not present and not accessible in the present. The normative material is irredeemably past or future. Yet like the unconscious, the normative material affects the normative structure of the legal present. The legal present is a breaching or broaching through action of normative material which is not otherwise present. The dynamic jurisprudences tolerate, indeed require, a legal unconscious.

Positivism makes the clearest statement of any jurisprudence that law to be law must be "marked" or written—once, according to a given procedure. The danger for every non-positivist jurisprudence is a collapse into positivism, a sacrifice of legal material to the apparent needs of unitary order, self-denial or self-rejection by persons, loss of interest in all but the vulgar, narrow version of writing.

Moses' law is not the only jurisprudence to face the positivist threat. Common law too has constantly been challenged by positivist distortion. When common law judges began writing opinions in the first third of the nineteenth century, the content and flavor of their judgments altered. Before they wrote opinions, students or reporters recorded the colloquies of judges, prior to voting. The written record of early common law decisions does not contain "opinions," but debates amongst judges. The written record presents a debate, followed by a vote and a verdict. It does not present an "opinion," a justification of a vote after the vote has been taken.<sup>168</sup>

The style of the modern record is a style of justification, not debate. Old records contain "hypotheticals" on every page—invented facts used by law-debaters to attack the statement of a rule. Hypotheticals are sparse in modern opinions. If we find them at all, we find a very different hypothetical. Modern judicial hypotheticals tend to show that a rule works and how it works, not that it fails to work. We find the attacking hypothetical mostly in the law school classroom. The main institution supporting the common law today is legal education, not the judiciary.<sup>169</sup>

Positivism and naturalism share a specific claim that the dynamic jurisprudences always reject, each in its own way. The claim is that

<sup>168</sup> For an account of the growth and decline of case law in England see J. Dawson, *The Oracles of the Law* 1-99 (1968). For an account of the effects of literacy on English legal culture see M. Clanchy, *From Memory to Written Record: England 1066-1307* passim (1979). See also B. Danet & B. Bogoch, *From "Say is Doing" to "Writing is Doing": The Institutionalization of the Written Word in Medieval English Legal Documents* (1988) (unpublished manuscript on file with the author).

<sup>169</sup> Philip Shuchman has collected and assessed data about the longevity and utility of published opinions in modern American law. See Shuchman, *The Writing and Reporting of Judicial Opinions*, in *The Role of Courts in Society* 319 (S. Shetreet ed. 1988).

the rule is complete, fully formed, prior to any case applying it. Common law and Moses' law never treat rules as complete, fully formed, prior to applying them.

To consider rules complete, from Moses' perspective, is to treat them as engravings. To apply rules to cases as if they are already formed bows to rules as idols. Creation is not complete, even if we want to treat it so. Rules rule only when persons struggle at every moment with them, use them in deeds to create a record. Common law holds a similar doctrine. Rules rule only when persons make them in applications. To make prior applications the last word is to deny that law is application.

Positivism and naturalism regard the incessant creation or re-creation of rules out of the very action the rules are supposed to govern as a destabilizing invitation to anarchy. The dynamic jurisprudences regard the incessant creation or re-creation of rules as at once the striving of persons (toward salvation, liberation, or reciprocity, as the case may be) and a spur to action.

Moses' account of the jurisprudence he discovered is our most passionate, thorough, profound and illuminating discourse on the rewards and perils of writing law. His warnings against positivism speak directly to common lawyers, as well as to practitioners of his own legal system. The warnings are as difficult to do and hear today, as they were for those first legal persons in the wilderness, struggling to free themselves, body and soul, from slavery. Positivism and naturalism are our own pharaonic temptations.